CONFLICTS OF INTEREST IN LAW PRACTICE: A PRACTICAL GUIDE
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Identifying conflicts of interest – and, where possible, resolving or waiving them – is a major ethical challenge for lawyers and law firms. Adversity to current and former clients can arise in a wide variety of ways, and may develop over time where none existed when the representation began. Joint representations and representation of business entities also give rise to many thorny ethical issues, including differing directives from clients and identifying your client. Without a clear understanding of overlapping and complex conflicts rules, lawyers are left to wander in a minefield of ethical traps. This program will provide you with a real-world guide to identifying conflicts at various levels and stages, and how to resolve them to avoid ethical liability.

- Ethics framework for identifying conflicts of interest & guidance on how to resolve them
- Adversity to current clients & former clients
- Joint representations & representations of business entities
- Imputation of conflicts & after-developing conflicts
- Advance waives – circumstances when they work and when they don’t
- Best practices on conflict screening and avoidance

Speakers:

Sue C. Friedberg is a partner in the Pittsburg office of Buchanan, Ingersoll & Rooney, PC. She is associate general counsel of the firm and responsible for guiding its attorneys in meeting the standards of ethical law practice. She supervises the firm's conflicts of interest review process and new business intake functions, and provides counsel for the firm as a business entity. Earlier in her career, she focused on corporate finance, securities law, and general business transactions. Ms. Friedberg earned her B.S., magna cum laude, from Georgetown University and her J.D., cum laude, from the University of Pittsburg School of law.

William Freivogel is the principal of Freivogel Ethics Consulting and is an independent consultant to law firms on ethics and risk management. He was a trial lawyer for 22 years and has practiced in the areas of legal ethics and lawyer malpractice for 20 years. He is chair of the Editorial Board of the ABA/BNA Lawyers’ Manual on Professional Conduct and recent past chair of the ABA Business Law Section Committee on Professional Responsibility. He maintains the Web site “Freivogel on Conflicts” at www.freivogelonconflicts.com. Mr. Freivogel is a graduate of the University of Illinois (Champaign), where he received his B.S. and LL.B.
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Speaker Contact Information

Conflicts of Interest in Law Practice: A Practical Guide

William Freivogel
Freivogel on Conflicts
(o) (312) 642-4567
billfreivogel@me.com
www.freivogel.com

Sue C. Friedberg
Buchanan Ingersoll & Rooney, PC
(o) (412) 562-8436
sue.friedberg@bipc.com
Select Sections of:

FREIVOGEL ON CONFLICTS

www.freivogel.com

Prepared for:

“Conflicts of Interest in Law Practice: A Practical Guide”

William Freivogel
Freivogel on Conflicts
(o) (312) 642-4567
billfreivogel@me.com
www.freivogel.com
Appealability of Disqualification
Arbitration of Malpractice Claims
Bankruptcy
Banks/Trust Departments
Board Positions
Changing Firms - Screening
Class Actions/Regulatory Proceedings
Client Mergers/Asset Sales
Co-Counsel/Common Interest
Commercial Negotiations

Corporations
Corporate Families
Criminal Practice

Current Client and Direct Adversity
Derivative Actions
Enjoining Conflicts (and other Non-traditional Remedies)
Expert Witnesses

Former Client

Government Entities - Suing One Part/Representing another Part
"Hot Potato" Doctrine
Initial Interview – Hearing too Much
In-House Law Departments
Insurance Defense
Investing in Clients/Stock for Fees
Issue or Positional Conflicts
Joint/Multiple Representation
Lawyer as Expert Witness or Consultant
Lawyers Representing Lawyers
Malpractice Liability/Fee Forfeitures

Of Counsel
Opposing Lawyers Negotiating a Law Practice Merger
Partnerships (Including Limited Partnerships)
Settlement Agreements
Standing
Trade (and other) Associations
"Underlying Work" Problem
Waivers/Consents
Waiver/Consent Forms
Witness – Adverse – Current/Former Client
Zero Sum Games
Note: due to the length of this page we have divided it into two parts, Part I (this page) and Part II (next page; click here). Part I discusses the basics of the current client rule with subcategories. Part II consists of cases that do not particularly illuminate the categories at Part I.

A law firm based in Chicago represents a corporate client (Client A) in one matter, a property tax appeal in San Diego, being handled by a partner in the firm's San Diego office. While that matter is pending, another client (Client B) asks a partner in the firm's Chicago office to bring a billion-dollar breach of contract suit against Client A. The alleged breach of contract has nothing whatsoever to do with the property tax matter in San Diego, and the corporate personnel involved are in different divisions and different cities. Can the law firm take on the breach of contract matter?


The Texas exception. Texas is the only state having a version of Model Rule 1.7 that permits a lawyer to be directly adverse to a current client on a matter unrelated to the representation. See Texas Rule 1.06(b)(1). The Fifth Circuit has specifically rejected the Texas rule, In Re Dresser Industries, Inc., 972 F.2d 540 (5th Cir. 1992). In In re Southwestern Bell Yellow Pages, Inc., 141 S.W.3d 229 (Tex. App. 2004), the court applied the Texas rule and said no disqualification; however, the court also found that the lawyer in question had not gained information in the other matter to assist the lawyer in this matter.

Ohio. Carnegie Cos., Inc. v. Summit Props., Inc., 2009 Ohio App. LEXIS 3973 (Ohio App. Sept. 9, 2009). This is a comprehensive discussion of current clients under the new Ohio Rules of Professional Conduct. It takes issue with several federal court
decisions decided under Ohio’s former unique version of Model Code DR5-105, which were somewhat more lenient than the ruling in this case.

"No Harm, No Foul." On occasion a court will allow a law firm to remain in a case where it was technically being adverse to a current client. Such a case is *Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc.*, 142 F. Supp. 2d 579 (D. Del. 2001) (although, also showing of a consent). More usually, this is where one representation had ended, was nearly "dead," was severely winding down, or was recently dead. See, for example, *Bayshore Ford Truck Sales, Inc. v. Ford Motor Co.*, 380 F.3d 1331 (11th Cir. 2004) (had conflict for brief time, then dropped one of the clients); *Boston Scientific Corp. v. Johnson & Johnson Inc.*, 2009 U.S. Dist. LEXIS 75527 (D. Del. Aug. 25, 2009) (firm had continuing current client conflict involving European matter but screen, etc.; same result, same parties, *Wyeth v. Abbot Labs.*, 2010 U.S. Dist. LEXIS 11032 (D.N.J. Feb. 8, 2010)); *Cliff Sales Co. v. Amer. Steamship Co.*, 2007 U.S. Dist. LEXIS 74342 (N.D. Ohio Oct. 4, 2007) (overlapping conflict lasted only two months with no harm to client); *LifeNet, Inc. v. Musculoskeletal Transplant Foundation*, 2007 U.S. Dist. LEXIS 29058 (E.D. Va. April 19, 2007) (one of the lawyers left the firm); *Pfizer, Inc. v. Stryker Corp.*, 256 F. Supp. 2d 224 (S.D.N.Y. 2003) (firm briefly represented the other side in two product liability cases, but then withdrew); *End of Road Trust v. Terex Corp.*, 2002 U.S. Dist. LEXIS 2586 (D. Del. 2002); *Research Corp. Tech., Inc. v. Hewlett-Packard Co.*, 936 F. Supp. 697 (D. Ariz. 1996); *SWS Financial Fund A v. Salomon Bros., Inc.*, 790 F. Supp. 1392 (N.D. Ill. 1992); *Kaminski Bros., Inc. v. Detroit Diesel Allison, Div. of Gen. Motors Corp.*, 638 F. Supp. 414 (M.D. Pa. 1985) (also a "hot potato" situation); *Air Products & Chemicals, Inc. v. Airgas, Inc.*, 2010 Del. Ch. LEXIS 35 (Ch. Del. March 5, 2010) (lawyers screened; matters not related; Cravath was the firm); *Airgas, Inc. v. Cravath, Swaine & Moore LLP*, 2010 U.S. Dist. LEXIS 78162 (E.D. Pa. Aug. 3, 2010) (motion to dismiss damages case against Cravath denied); *Goodman v. Goodman*, 2008 Mo. App. LEXIS 1375 (Mo. App. Oct. 7, 2008) (no showing the “fair or efficient administration of justice” was threatened); *Develop Don’t Destroy Brooklyn v. Empire State Development Corp.*, 816 N.Y.S.2d 424 (N.Y. App. 2006); In *Prudential Ins. Co. of America v. Anodyne, Inc.*, 365 F. Supp. 2d 1232 (S.D. Fla. 2005), the court denied a motion to withdraw even though the moving law firm discovered that it was representing the other side on unrelated matters. The court relied heavily on SWS, above as well as what is now § 11.21 of Hazard, Hodes & Jarvis. In *Gen-Cor, LLC v. Buckeye Corrugated, Inc.*, 111 F. Supp. 2d 1049 (S.D. Ind. 2000), the court found a current client conflict by virtue of a parent-subsidiary relationship, but rejected disqualification because the client would not be prejudiced by the conflict. In *Atofina Chemicals, Inc. v. Jci Jones Chemicals, Inc.*, 2002 U.S. Dist. LEXIS 13970 (E.D. Pa. July 10, 2002), the court held that because one of the representations was surely going to end, in any event, and to avoid prejudice to the client of the firm with the conflict,
the court denied the motion. A variation on "no harm, no foul" is *Stanton v. Northside Marina at Sesuit Harbor, Inc.*, 2005 U.S. Dist. LEXIS 17942 (D. Mass. Aug. 18, 2005). It was not a disqualification case. An aggrieved litigant attempted to have a summary judgment hearing stayed because of a conflict. The court denied the stay because the litigant was not prejudiced by the conflict. In *Hempstead Video, Inc. v. Village of Valley Stream*, 409 F.3d 127 (2d Cir. 2005), the court held that a law firm could be adverse to the current client of an of counsel where the firm could show that the of counsel has been screened from the firm's matter. In *Board of Regents of the Univ. of Neb. v. BASF Corp.*, 2006 U.S. Dist. LEXIS 58255 (D. Neb. Aug. 17, 2006), the court allowed a law firm to oppose a party, even though the law firm was representing that party in another case, not related to this case. There is too much to the case to repeat here, but if you want to be adverse to a current client, you should read it. In *Doctor John's, Inc. v. City of Sioux City*, 2007 U.S. Dist. LEXIS 90 (N.D. Ia. Jan. 2, 2007), the court gave a law firm a pass even though for a short period of time it had a current-client conflict. In *Abubakar v. County of Solano*, 2008 U.S. Dist. LEXIS 12173 (E.D. Cal. Feb. 4, 2008), lawyer interviewed opponents in one case while defending employer in another case; no disqualification. In *Great American Ins. Co. v. General Contractors & Construction Mgm’t, Inc.*, 2008 U.S. Dist. LEXIS 37015 (S.D. Fla. May 6, 2008), the court allowed a law firm to be adverse to a current client.


*Odd Sequence.* In *Friskit, Inc. v. RealNetworks, Inc.*, 2007 U.S. Dist. LEXIS 51774 (N.D. Cal. July 5, 2007), the court denied a motion to disqualify where the movant was the second of the two clients to have retained law firm.
In *Starwood Hotels & Resorts Worldwide, Inc. v. Aoki Corp.*, 768 N.Y.S.2d 9 (N.Y. App. 2003), a law firm, because of a merger, wound up on both sides of a case for several months. A lawyer for one side left the firm, and the court allowed her and her new firm to keep the client. While she was with the former firm, the lawyers for each side were in different cities and had little contact. In a similar scenario the court in *Laucella v. Ireland San Filippo, LLP*, 2006 Cal. App. Unpub. LEXIS 359 (Cal. App. Jan. 13, 2006) disqualified the law firm.

*Combustion Engineering Caribe, Inc. v. George P. Reintjes Co., Inc.*, 298 F. Supp. 2d 215 (D.P.R. 2003). This is a suit involving a troubled construction project. The relevant entities in question are three subcontractors, Sub1, Sub2, and Sub3. Sub1 hired Sub2, and Sub2 hired Sub3. When things went badly, Sub1 sued Sub2 (this case). Sub3 is not a party in this case. When it came time for Sub1 to depose two employees of Sub3 (the non-party), one of Sub2’s lawyers, Duane Fox, announced that he would be representing not only Sub2 at the depositions, he would also be representing Sub3 and the two deponents, for purposes of the depositions. After the depositions Sub1 moved to disqualify Fox from representing Sub2, because it was a conflict to represent both Sub2 and Sub3. Sub2 first raised Sub1’s standing to make the motion. The court admitted that standing was an issue and noted authorities going both ways. Then, without expressly ruling on standing, the court went on to rule on the merits and denied the motion. The court acknowledged that there were disputes between Sub2 and Sub3, although, again, Sub3 had not been brought into the case. But, the court felt that as to the issues in this case, and as to discovery in this case, Sub2 and Sub3 had common interests. It was also important that Fox’s limited role in temporarily representing Sub3 in certain discovery activities diminished any chance that Sub3 would be prejudiced with respect to its dispute with Sub2.

In *Sperr v. Gordon L. Seaman, Inc.*, 727 N.Y.S.2d 456 (N.Y. App. June 18, 2001), a law firm defended Hicksville Cinemas in two personal injury actions, which have been settled. While those cases were pending, the law firm, in a third personal injury case involving the same property, filed a third-party action against Hicksville Cinemas on behalf of the defendant. The court affirmed the trial court’s order disqualifying the law firm in the pending, third case. The court said in part:

This case involves a law firm which, even if for a relatively brief time, represented a client in one personal injury case while simultaneously opposing relief sought by that same client in a separate personal injury case involving the same premises. Thus, there is a more serious risk of an appearance of impropriety than in the case of a lawyer who later adopts a position which is adverse to that of a former client in a substantially related matter (see, Code of Professional Responsibility DR 5-108 [22 NYCRR 1200.27] . . . .
g(ii). It says that where there is not an attorney-client relationship, the law of agency applies, and that law does not impute the knowledge of agents to others. Other helpful authorities are Restatement § 15 and Model Rule 1.18. Those provisions relate to information gathered from “prospective clients.” They provide that the lawyer is to keep the information confidential and not use it to the prospective client’s disadvantage. It is important to note that both provisions provide that a screen will prevent other lawyers in the firm from being disqualified. Thus, one could argue that a law firm obtaining non-client information while doing due diligence could also use a screen. There appears to be no logical difference between the two situations. To see other “prospective client” cases, go to “Initial Interview/Hearing too Much,” in this site.


What Is a "Current" Client?

When is a client a "current" client, as opposed to a "former" client? That is discussed at the section entitled "Former Client - the Substantial Relationship Test." To go there, click here.

What Is Direct Adversity?

Suing a current client is direct adversity. What about negotiating a major contract for one client when the opposite party to the contract is a current client of the firm on unrelated matters? That is probably direct adversity, but there are few cases or opinions on the subject. See the section of this publication entitled, "Commercial Negotiations."

What about suing a non-client where the outcome will have an adverse economic impact on another client who is not a party to the law suit. For example, can a law firm sue a person who is a guarantor on a note held by a current client where the
maker of the note is in financial difficulty? There are few cases that address that issue. ABA Op. 95-390 (1995) contains an excellent discussion of direct adversity in the corporate family context. Also, see the section of this publication, entitled, "Corporate Families." ABA Op. 95-390 cites a case that is very similar to the guarantor situation, North Star Hotels Corp. v. Mid-City Hotel Associates, 118 F.R.D. 109 (D. Minn. 1987).

The Standing Committee on Ethics and Professional Responsibility of the American Bar Association has provided valuable insight into what is “direct adversity” in two opinions. Formal Opinion 05-434, dated December 8, 2004, deals with a testator who asks a lawyer to draft a new will, the effect of which is to disinherit the testator’s son. The problem is the son is a client of the lawyer on matters unrelated to the testator’s estate. The court held that drafting the will is not direct adversity to the son, and the lawyer does not need the son’s consent to do the will. The Committee does point out scenarios under which the lawyer may not be able to do the will, which we will not elaborate on here. Anyone who has this situation should read Opinion 05-434. Formal Opinion 05-435, also dated December 8, 2004, deals with a lawyer who represents an insurance company as a named party in litigation. Now, in an unrelated matter, another client (“Client A”) asks the lawyer to file a lawsuit against Defendant B. The problem is that Defendant B is insured by a policy issued by the lawyer’s insurance company client. The Committee opined that without more, pursuing the lawsuit against Defendant B is not direct adversity to the insurance company. As was the case in Opinion 05-434, the Committee discusses scenarios under which filing the suit may not be permissible.

GATX/Airlog Co. v. Evergreen Int'l. Airlines, Inc., 8 F. Supp. 2d 1182 (N.D. Cal. 1998) furnishes another twist on direct adversity. The owner of several 747 passenger airplanes sued a company that allegedly did faulty work in converting them to freight airplanes. The defendant's law firm also represented a major bank on a variety of matters. Well into the 747 litigation, the parties realized that the bank was an owner of one of the airplanes that had been converted, although the bank had not yet filed its own suit. The bank moved to intervene in the original suit to have the law firm disqualified. The court granted the motion, saying it should have been clear early on that the law firm's actions were adverse to its bank client - even though the bank had not yet filed an action. The law firm's status later became moot, and the Ninth Circuit ordered the disqualification order vacated, at 192 F.3d 1304 (9th Cir. 1999).

In Harvey E. Morse, P.A. v. Clark, 890 So. 2d 496 (Fla. App. 2004), the court held that the law firm representing a trust, which was trying to deplete a decedent’s estate in favor of the trust, was directly adverse to the heirs of the estate. Because one of the
heirs (actually, an assignee of several heirs) was a current client of the firm on unrelated matters, the court held the firm had a direct adversity conflict.

What About Referring other Party to Lawyer. D.C. Op. 326 (Dec. 2004). The D.C. Bar Ethics Committee opined that a lawyer with a conflict may refer the non-client to another lawyer. The Committee relied principally upon D.C.’s version of Model Rule 4.3. Compare Flatt v. Superior Court, 885 P.2d 950 (Cal. 1994), in which the court held that a lawyer did not have a duty to advise a declined client about the statute of limitations if doing so would disadvantage an existing client.

"Potential" vs. "Actual" Conflicts. In most contexts and in most jurisdictions lawyers are disqualified for having "actual" rather than "potential" conflicts. See, for example Shaffer v. Farm Fresh, Inc., 966 F.2d 142 (4th Cir. 1992); Guillon v. City of Chicago, 956 F. Supp. 1416 (N.D. Ill. 1997); Chapman Engineers, Inc. v. Natural Gas Sales Co, 766 F. Supp. 949 (D. Kan. 1991); In re Possession & Control of Commissioner of Banks, 764 N.E.2d 66 (Ill. App. 2001); and Bottoms v. Stapleton, 706 N.W.2d 411 (Ia. 2005). However, California Rule 3-310(C)(1) says a lawyer may not represent interests that "potentially" conflict, without consents. In Glahn & Hirschfield v. Taylor, 2004 Cal. App. Unpub. LEXIS 3249 (Cal. App. April 7, 2004), the court described how California courts define "potential" (a situation that is "reasonably likely" to lead to an actual conflict). Another case discussing these distinctions is Maali v. Abtahi, 2008 Cal. App. Unpub. LEXIS 454 (Cal. App. Jan. 16, 2008). "Potential conflict" is also used in bankruptcy cases. To read about those go to "Bankruptcy" at this site. The distinction is also made in the criminal cases. To read about them, go to "Criminal Practice."


Patent Opinions. Va. Op. No. 1774 (Feb. 13, 2003). This may be a first. A law firm is asked by client A to render a validity opinion on a patent owned by B. B is a patent client of the firm, but on other types of products. The Virginia committee opined that to render the opinion is direct adversity under Va. Rule 1.7(a), and that the firm can only do so with the consent of A and B. More recently, a court made a similar holding regarding a non-infringement opinion, Andrew Corp. v. Beverly Mfg. Co., 415 F. Supp. 2d 919 (N.D. Ill. 2006). That is the first court opinion so holding, of which we are aware. Also, see Samuel C. Miller, Ethical Considerations in Rendering Patent

Bond Lawyer Conflicts. Iowa Op. 06-03 (November 6, 2006). This opinion softens Iowa’s position on conflicts for municipal bond lawyers. It provides that a law firm may represent an issuer when it is already representing the underwriter in other, unrelated, transactions, provided waivers are obtained, and the parties signing the waivers are sophisticated. Earlier Iowa Op. 95-20 (February 22, 1996), would have prevented such a waiver and would have barred a law firm from representing an issuer where the firm represents the underwriter currently, or had represented the underwriter in the past.

Banks/Trust Departments. May a lawyer doing lending work for a bank oppose the bank in its capacity as a fiduciary? There is little judicial guidance. For a full discussion of this, go to "Banks/Trust Departments" by clicking here.

Zero Sum Games. May a law firm assist one client in seeking a broadcast license in competition with another client? May a law firm assist one client in collecting a debt, where another client is also a creditor of the same debtor, and the amount of money available is not enough to satisfy both. We discuss these issues and provides cases and opinions on them at a section entitled "Zero Sum Games." To go there, click here.

"Nominal" Clients. In the following cases the court held that the lawyer's representation of one of the clients was only nominal, so the lawyer could be adverse to that "client:" Commercial Union Ins. Co v. Marco Int'l. Corp., 75 F. Supp. 2d 108 (S.D.N.Y. 1999); Guzewicz v. Eberle, 953 F. Supp. 108 (E.D.Pa. 1997); and In re Dooley, 599 N.W.2d 619 (N.D. 1999). In American Special Risk Ins. Co. v. Delta America Re Ins. Co., 634 F. Supp. 112 (S.D.N.Y. 1986), the court allowed a law firm to stay in a matter using the “nominal client” rubric; however, the law firm was doing real work for the client, and the client was “nominal” in the matter where the law firm was adverse to it.

"Vicarious Clients." Atrotos Shipping Co., S.A. v. The Swedish Club, 2002 U.S. Dist. LEXIS 9018 (S.D.N.Y. May 20, 2002). A ship owner is suing its "Freight, Demurrage, and Defense" insurance carrier, The Swedish Club ("TSC"). TSC usually appoints law firms to represent ship owners, all correspondence is between the law firm and TSC, and TSC pays the law firm's fees. The law firm for the plaintiff is also representing TSC in other shipping losses. TSC moved to disqualify the law firm in this case, because of these other matters. The law firm responded that it was really representing the insured in the other cases and that TSC was merely a "vicarious" client. The court disagreed and disqualified the law firm.
Third-Party Actions. Richmond American Homes of Northern California, Inc. v. Air Design, Inc., 2002 Cal. App. Unpub. LEXIS 6948 (Cal. App. July 25, 2002). A sued B. B filed a third-party action against C. C moved to disqualify A’s lawyer because that lawyer had previously represented C on substantially related matters. A claimed that A was not suing C, so there was no adversity. The Appellate Court disagreed noting that third-party defendants can defend against a third-party complaint by attempting to prove the defendant had no liability to the plaintiff. The court held that is being directly adverse to the former client. (While this is not a current client conflict, the same analysis regarding third-party complaints should apply to current clients.) Another third-party action in which the court held that a lawyer could not represent both the plaintiff and the third-party defendants is Pressman-Gutman Co., Inc. v. First Union National Bank, 459 F.3d 383 (E.D. Pa. 2004). The court disqualified the law firm from representing the third-party defendants. And, upon reconsideration, the court ordered the law firm out of the case entirely, Pressman-Gutman Co., Inc. v. First Union National Bank, 2004 U.S. Dist. LEXIS 23991 (E.D. Pa. Nov. 30, 2004). The Third Circuit denied mandamus at Pressman-Gutman Co., Inc. v. First Nat. Bank, 459 F.3d 383 (3d Cir. 2006). In In re Methyl Tertiary Butyl Ether Products Liab. Lit., 438 F. Supp. 2d 305 (S.D.N.Y. 2006), a law firm started out representing plaintiffs and a third-party defendant. When challenged, it withdrew from representing the latter. In Liberty Mut. Fire Ins. Co. v. Ravannack, 2006 U.S. Dist. LEXIS 50252 (E.D. La. July 21, 2006), the court allowed a lawyer to represent both a plaintiff and a third-party defendant (with a waiver) without discussing the conflict and the ability of the parties to understand it. Same, in Hall Dickler Kent Goldstein & Wood, LLP v. McCormick, 930 N.Y.S.2d 195 (N.Y. App. 2007). In Decker v. Nagel Rice LLC, 2010 U.S. Dist. LEXIS 26530 (S.D.N.Y. March 22, 2010), the court ruled that a lawyer could not represent the plaintiff and be a third-party defendant.

Attempt to Apply "Substantial Relationship" Test to Current Client Situation. And, Much More. Reed v. Hoosier Health Systems, Inc., 825 N.E.2d 408 (Ind. App. 2005). The lawyers representing the plaintiff in this corporate dispute are in a law firm that represents the defendants in medical malpractice suits. The trial court granted the defendants’ motion to disqualify plaintiff’s lawyers, and in this opinion the appellate court affirmed. The plaintiff bravely attempted to get the court to apply the “substantially related” test even though the conflict is a current one under Indiana’s version of Model Rule 1.7(a)(1). The court did not buy that one. The law firm also offered to withdraw from the malpractice cases. The court did not buy that one either, citing the “hot potato” cases. Last, the plaintiff tried to argue that defendants weren’t really clients of the firm in the malpractice cases because of the nature of their relationship to their malpractice carrier. This argument was based upon the fact that
the insurance company appointed defendants’ law firm and had complete control of the defense, and only the insurance company had exposure. That argument also failed.


Strother v. 3464920 Canada Inc., 2007 SCC 24 (Can). Lawyer did tax shelter work for Client No. 1 for several years and through 1997. The law changed in 1997, and Lawyer advised Client No. 1 that it could do no further tax shelter deals of the sort it had been doing. Lawyer’s law firm (“Law Firm”) continued to do other work for Client No. 1 through 1998 and into 1999. In early 1998 Lawyer began representing Client No. 2, and, through a loophole in Canadian tax law, Lawyer did a number of tax shelter deals for Client No. 2, similar to those Lawyer had done for Client No. 1. Further, Lawyer had an agreement that Client No. 2 would share its profits with Lawyer. When Client No. 1 learned of Lawyer’s work for Client No. 2, it sued Lawyer and Law Firm for breach of fiduciary duty for failure to advise Client No. 1 of the loophole opportunities. The key issue was whether Lawyer had an obligation in 1998 to advise Client No. 1 of the loophole. As of 1998 Law Firm had no written engagement letter with Client No. 1. The B.C. trial court held that Lawyer and Law Firm had no duty to advise Client No. 1 of the loophole. The B.C. Court of Appeal disagreed and reversed. In this opinion the Supreme Court of Canada, in a 5-4 opinion affirmed the Court of Appeal on the issue of liability of Lawyer. The Supreme Court ruled that Law Firm had no liability for breach of fiduciary liability but might be vicariously liable under the Canadian Partnership Act. According to press accounts the Supreme Court’s ruling on damages reduced Lawyer’s exposure from upwards of $40 million to about $1 million.

S.C. Op. 05-14 (2005). Lawyer may not represent mortgagor in foreclosure proceeding when the mortgagee is a client in other foreclosure proceedings without a waiver from the mortgagee.


Enzo has sued Amersham for infringement of the same patents. Amersham is a subsidiary of GE. Law Firm represents Enzo in this case (the Applera case). Another firm represents Enzo in the Amersham case. Law Firm represents GE in other intellectual property matters. For that reason GE intervened in this case to move to disqualify Law Firm. In this opinion the court denied the motion. There was some evidence that Law Firm communicated with the law firm representing Enzo in the Amersham case in order to present consistent claims construction positions. However, Law Firm has committed not to participate in any appeals of the claims construction rulings. The court added:

While the construction of Enzo's patents applicable to the infringement claims brought against two separate accused infringers, Amersham and Applera, implicates pretrial Markman overlap, the trials of how those constructions apply to the respective accused products or conduct are wholly separate. GE has not claimed that any of its witnesses in Amersham will be cross-examined by [Law Firm] in Applera, as contemplated as demonstrating direct adversity under Rule 1.7(a)(1).


Secondment. N.Y. City Op. 2007-2 (undated). Here is the Committee's digest:

A law firm may second a lawyer to a host organization without subjecting the law firm to the imputation of conflicts under DR 5-105(D) if, during the secondment, the lawyer does not remain “associated” with the firm. The seconded lawyer will not remain associated with the firm if any ongoing relationship between them is narrowly limited, and if the lawyer is securely and effectively screened from the confidences and secrets of the firm’s clients. Both during the secondment and afterward, the seconded lawyer and his or her employer should be mindful of the lawyer’s former-client conflicts under DR 5-108.

Representing Client and Having Simultaneous Fee Dispute. L.A. County Op. 521 (2007). This opinion discusses the extent to which a lawyer may continue to represent a client in the face of a disagreement over fees.

Threats by Client to Sue for Malpractice Grounds for Withdrawal. Moore v. United States, 2008 U.S. Dist. LEXIS 34741 (E.D. Cal. April 28, 2008). Plaintiffs in this case threatened to sue their law firm for malpractice. In this opinion the court ruled that the
threat created a conflict of interest and ruled that the law firm’s motion to withdraw should be granted.

*Commercial Development Co. v. Abitibi-Consolidated Inc.*, 2007 U.S. Dist. LEXIS 86147 (W.D. Wash. Nov. 15, 2007). This is a suit for specific performance of a real estate sales contract, among other things. A realtor (“Realtor”), affiliated with the real estate agency (“Agency”) representing the seller, successfully moved to intervene to defend her conduct, which appeared to be put in issue by the plaintiffs. Realtor then moved to disqualify the plaintiffs’ law firm (“Law Firm”) because Law Firm represents Realtor and has represented Realtor on matters substantially related to this matter. In this opinion the court granted the motion. The court plowed no new ground, here, and the analysis was very fact-intensive. Law Firm’s relationship with Realtor came about through Law Firm’s representation of Agency, for which Realtor was an independent contractor. Realtor paid a portion of Law Firm’s fees pursuant to her contract with Agency. A partner at Law Firm (“Lawyer”) had counseled with Realtor on issues similar to those in this case.

Ore. Op. 2009-182 (Oct. 2009). In this opinion the Committee held that the filing of a Bar complaint by a client does not necessarily require the lawyer to withdraw from an ongoing representation that is the subject of the Bar complaint.

**If You "Have to Ask," Rule 1.7(a)(2) Is Almost Certainly Involved - A Comparison with Rule 1.7(a)(1)**

Rule 1.7(a)(2) may be involved where there is no direct adversity against a current client. It applies if the representation of a client "may be materially limited" by the lawyer's responsibility to someone else or by the lawyer's own interests. If the answer is "maybe," then the lawyer must be satisfied that "the representation will not be adversely affected," (1.7[b][1]) and the client consents (1.7[b][4]).

Take the guarantor situation mentioned above. Notwithstanding the North Star case, which the drafters of ABA Op. 95-390 believe stretches the meaning of direct adversity under Rule 1.7(a)(1), an analysis of Rule 1.7(a)(2) would still be required. That is, would the lawyer's loyalty to the payee of the note cause the lawyer to do less than a perfect job in going after, and possibly bankrupting, the guarantor. Stated another way, if you are concerned about whether 1.7(a)(1) applies, and you decide that it does not, you are almost certainly going to have to go through the 1.7(a)(2) analysis.


Sands v. Menard, Inc., 787 N.W.2d 384 (Wis. 2010). According to an arbitration panel, on the evening of March 14, 2006, Dawn Sands, the general counsel of Menard's, the building materials chain, was sitting at her desk preparing for a meeting. John Menard, the company founder, entered her office and said; "Pick your shit up; I want your ass out of here. You've got five minutes." (Thus, setting a new standard for civility in terminating a general counsel.) Sands brought an arbitration, and the panel awarded her almost $1.8 million in damages and ordered her reinstated. The trial court ordered that the award be enforced. The appellate court affirmed. In a 4-3 decision (this opinion) the Wisconsin Supreme Court reversed the reinstatement and remanded to the trial court to consider "front pay" damages in lieu of reinstatement. The existing $1.8 million award was not disturbed. The majority ruled that, given the degree of animosity between the parties, Sands could not possibly comply with her ethical obligations if she were to return to the company. The majority cited only Wisconsin Rule 1.7(a)(2), the material limitation provision. The vigorous dissent, arguing for reinstatement, centered primarily upon the need for preserving the integrity of arbitration awards. However, it contains one of the lengthier discussions of the material limitation provision of Rule 1.7 that we have seen.

Suing Current Client for Fees. In re Simon, 2011 N.J. LEXIS 641 (June 9, 2011). In this opinion the New Jersey Supreme Court upheld a reprimand of a lawyer who had sued a current client for fees. It was a murder case, from which the lawyer was trying to withdraw. The trial court had denied the lawyer leave to withdraw. After the suit for fees was filed, the court granted the lawyer leave to withdraw. The court held that the suit for fees under these circumstances was a violation of New Jersey Rule 1.7(a)(2), the material limitation rule.

(posted May 18, 2011) In re Bruzga, 2011 N.H. LEXIS 64 (N.H. May 12, 2011). Lawyer advised Client on whether Client could remove funds from a "special needs trust" set up under Medicaid laws. After Client paid the funds to himself and his sister, Medicaid investigators began an investigation of Client, the sister, and Lawyer as to whether the funds should have been paid to the government. Lawyer continued to advise Client as to the investigation. Ultimately, the government ordered Client and his sister to disgorge the funds. A bar prosecution began against Lawyer. In this opinion the court considered whether Lawyer violated New Hampshire's version of
MR 1.7(a)(2) (the material limitation provision - - designated "1.7(b)" in New Hampshire), because Lawyer represented Client while they were both being investigated. The court ruled that Lawyer did violate that rule (among others). The court suspended Lawyer for six months. Lawyer had been disciplined on three prior occasions, two of them resulting in suspensions of one year and six months, respectively.

Lawyer argues that his client and not lawyer liable for sanctions, making lawyer subject to further sanctions. Wade v. Soo Line R.R. Corp., 500 F.3d 559 (7th Cir. 2007).

Coe v. Northern Pipe Products, Inc., 589 F. Supp. 2d 1055 (N.D. Ia. 2008). This is an employment discrimination case. Disqualification was not an issue. Nevertheless, when discussing the difference between a "mixed motives" claim and a "but for" claim, the court made the following interesting observation:

Indeed, this court has often wondered if plaintiffs' lawyers explain these realities to plaintiffs and let them decide whether to pursue a "but for" or "mixed motive" claim or both. If an attorney does not make such a full disclosure that allows the plaintiff personally to decide which claim or claims to pursue, this court suggests that there may be a conflict of interest between the lawyer and the client. After all, there are some cases in which it is to the plaintiff's lawyer's advantage to pursue a "mixed motives" claim, which would provide compensation to the lawyer, but it would not be to the plaintiff's advantage to do so, because the plaintiff might recover nothing, and vice versa.

Shanley v. Cadle Co., 2010 U.S. Dist. LEXIS 131560 (D. Mass. Dec. 3, 2010). Lawyer appeared for several plaintiffs in this litigation. The defendant is Cadle Co. Lawyer, in other venues, is engaged in a bitter personal battle with Cadle Co. Among other things, Cadle Co. obtained a defamation judgment of $250,000 against Lawyer. In this brief opinion the court expressed serious concern about Lawyer's ability to adequately represent the plaintiffs in these cases, citing the material limitation provision in Massachusetts' version of MR 1.7. The court ordered Lawyer and Lawyer's co-counsel to file affidavits explaining how Lawyer's personal battles with Cadle Co. will not jeopardize Lawyer's performance in these cases. Stay tuned.

Negotiating Lawyer's Fee with Settlement Amount (posted February 18, 2011) Martin v. Huddle House, Inc., 2011 U.S. Dist. LEXIS 13670 (N.D. Ga. Feb. 11, 2011). In this opinion the court refused to approve the settlement of FLSA claims because the plaintiffs' lawyer negotiated the settlement amounts and his fees "simultaneously." The court scheduled a hearing to deal with "this potential ethical violation."
Valley/50th Ave. LLC v. Morse and Bratt, P.S.C., 2011 Wash. App. LEXIS 1286 (Wash. App. June 1, 2011). Without more, the taking of a security interest from a client does not constitute a “material limitation” under Washington’s version of MR 1.7(a)(2).

O’Malley v. Novoselsky, 2011 U.S. Dist. LEXIS 66406 (N.D. Ill. June 14, 2011). Lawyer is a defendant in two consolidated lawsuits. One suit is by a former client ("FC"), who is claiming return of $160,000 in fees. The other suit is by a lawyer formerly employed by Lawyer ("FE"). FE is claiming that he is entitled to 1/3 of FC's $160,000, pursuant to an employment agreement between FE and Lawyer, because FE had referred FC to Lawyer. FC and FE are represented by the same lawyer ("Gentleman"). FC is also represented by Johnson. The court held, among other things, that pursuant to the Northern District's version of Model Rule 1.7(a)(2), any belief by Gentleman and Johnson that they could adequately represent both FC and FE would be unreasonable.

Restatement. See §§ 121, 125, and 128.

Treatise. Hazard, Hodes, & Jarvis §§ 11.2-11.5.

Introduction

When Does a “Current Client” Become a “Former Client”?  
What is Substantial Relationship?  
What is “Materially Adverse”?  
“Accommodation Client”  
Playbook

Other Cases and Opinions on Former Client

Introduction

Model Rule 1.9(a) states as follows:

   A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

We discuss obligations with respect to current clients at the section entitled, "Current Client and Direct Adversity." To go there, click here. For purposes of this section, the key provision regarding current clients is at Model Rule 1.7(a):

   A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless . . . .

Thus, it makes a difference, for conflicts purposes, whether the client is "current" or "former." If the client is current, the lawyer may not be directly adverse without consent. As to former clients, the lawyer may be directly adverse unless the new matter is "substantially related" to what the lawyer did for the former client.

This section is built around two issues: (1) When does a current client become a former client - and thus trigger the substantial relationship test?; and (2) What is "substantially related"? Included is a discussion of the "accommodation client" concept. Finally, the section deals with an important subset of the substantial
relationship issue - what Professor Wolfram refers to as the "playbook view." Charles W. Wolfram, Former-Client Conflicts, 10 Geo. J. Legal Ethics 677 (1997). The "playbook view" refers to situations where a lawyer learns from a current client how the client approaches - or specific employees of the client approach - legal matters, thereby giving the lawyer a supposed advantage when opposing that person or entity as a former client. More about Professor Wolfram's article and the "playbook view" later.

Another very helpful source on these issues is Joan C. Rogers, Conflicts of Interest: Representation Adverse to Former Client, Current Reports, August 14, 2002, p. 490, ABA/BNA Law. Man. Prof. Conduct, now pages 51:201-243 in the large binder. It is an excellent 30-page article on former clients. It includes such subjects as client mergers/asset sales, joint defense arrangements, "accommodation clients," "playbook" information, advance consents, and much, much more. It is the best writing on these subjects since Professor Wolfram's article, cited above. Anyone with a former client issue should consult the Wolfram and Rogers articles. This site will continue to add cases on these subjects.

*Warning*: More cases deal with former client issues than just about any other issue relating to conflicts of interest. The cases also tend to be more fact-specific than those in other areas - particularly as to what is "substantially related." Thus, many of them have relatively little value as precedent. It is the philosophy of this site to be as comprehensive as possible in including cases and opinions. However, given the large number of cases on these subjects and their fact-specific nature, we will cite leading examples without trying to set a record for number of cases and opinions cited.


**When Does a "Current Client" Become a "Former Client"?**

When confronted with a conflict of interest argument, a lawyer would love to be able to fish out of her file a letter to the client that says the following:
his matter has concluded. We plan to do no further work for you, and you are no longer our client.

Lawyers hate to write letters like that. A truly effective letter may offend the client. Moreover, the lawyer wants to maintain a bond with the client so that it will send more business. Thus, these letters are rarely written, and the courts must resort to other indicia. Following are examples of cases where the courts did so:


Fascinating discussion of situation where all the work was done but no “official” termination had occurred. The court found that the representation was current, but held that no harm would result to that client by allowing the law firm to continue on the other side of this unrelated case. Metropolitan Life Ins. Co. v. The Guardian Life Ins. Co. of America, 2009 U.S. Dist. LEXIS 42475 (N.D. Ill. May 18, 2009).

Fenik v. One Water Place, LLC, 2007 U.S. Dist. LEXIS 10096 (N.D. Fla. Feb. 14, 2007). Law firm had ceased representing plaintiff on other matters several months prior to this case being filed. That law firm appeared for the defendant in this case. The court denied plaintiff's motion to disqualify law firm, noting, among other things, that plaintiff hired a different law firm to file this case.

Jones v. Rabanco, Ltd., 2006 U.S. Dist. LEXIS 53766 (W.D. Wash. Aug. 3, 2006). Work had ceased three years prior, but: (1) client's officers stated they believed it was still a client; (2) the law firm in question was listed as one to receive notice of a breach of the settlement agreement, which was to remain in force until 2011; (3) the law firm had not written a letter saying the representation had ceased; (4) the law firm's books showed the matter as "open;" and (5) the law firm was incurring the cost of storing 49 boxes of documents in case they were needed for further developments in the prior matter. Court held, "current client."

Kabi Pharmacia AB v. Alcon Surgical, Inc., 803 F. Supp. 957 (D. Del. 1992) The law firm had not given the client advice for "many months," but the court held that it was still a current client.

JTH Tax, Inc. v. H & R Block Eastern Tax Services, Inc., 2002 U.S. App. LEXIS 477 (4th Cir. 2002). A law firm was representing JTH against Block in federal court, while representing Block in a state court action. The district court held that the law firm did not violate Rule 1.7(a), because the state court action was "dormant." The court then did a former client analysis.

Int'l. Bus. Machines Corp. v. Levin, 579 F.2d 271 (3d Cir. 1978). A lawyer handled a series of labor matters for IBM. Shortly after completion of the most recent one, the lawyer showed up on the other side of an antitrust case. The court upheld the district court's disqualification of the firm and said:

   Although [the firm] had no specific assignment from IBM on hand on the day the antitrust complaint was filed and even though [the firm] performed services for IBM on a fee for service basis rather than pursuant to a retainer arrangement, the pattern of repeated retainers, both before and after the filing of the complaint, supports the finding of a continuous relationship.

Oxford Systems, Inc. v. CellPro, Inc., 45 F. Supp. 2d 1055 (W.D. Wash. 1999). The law firm had done all a company's work in the State of Washington for 13 years. At the time it took on a matter adverse to the company, nothing had been pending for about a year. Nevertheless, the court held that the company was a current client because of the company's General Counsel's subjective belief that it was a current client. To the same effect (although individual), Shearing v. Allergan, Inc., 1994 WL 382450 (D. Nev. 1994).

McCook Metals L.L.C. v. Alcoa, 2001 U.S. Dist. LEXIS 497 (N.D. Ill. 2001). Alcoa had a brief flirtation with Jenkens & Gilchrist ("J&G"), which included the exchange of general information. Alcoa assigned a trademark search to J&G, which consumed just several days. A few days after the trademark search concluded, J&G entered into litigation against Alcoa for McCook. Alcoa moved to disqualify J&G, and the court denied the motion.

Riggs Nat'l. Bank of Washington, D.C. v. Calumer-gussin, 1992 U.S. Dist. LEXIS 16475 (D.D.C. 1992). A law firm handled several matters for a client. When the client refused to pay a total of $270,000 in overdue fees, the firm withdrew from one case. The only other pending matter, an administrative proceeding, concluded at about the same time. Shortly after all this occurred a bank retained the firm to sue the "former client." The court refused to disqualify
the firm. The court stressed that at the time the firm severed its relationship with the former client, the firm knew nothing of the bank's claim against the former client.

*Artromick Int'l., Inc. v. Drustar, Inc.*, 134 F.R.D. 226 (S.D. Ohio 1991). About a year had elapsed since the law firm had done any work for the client. A small invoice remained outstanding. The firm sent at least one piece of promotional material to the client during that year. Nevertheless, the court refused to disqualify the firm when it showed up on the other side of a case. A case that cited Artromick on the promotional material point is *Edelstein v. Optimus Corp.*, 2010 U.S. Dist. LEXIS 108351 (D. Neb. Sept. 24, 2010).

*Manoir-Electroalloys, Inc. v. Lachmann*, 711 F. Supp. 188 (D.N.J. 1989). A law firm had done many things for a client "from the 'seventies' until 1983-84. It sent a "dear friend" letter to the "client" in 1988. It turned up on the other side of a matter shortly thereafter. It was one of those situations where a "we-don't-represent-you" letter would have been nice. In disqualifying the firm, the court commented:

[The firm] cannot, of course, isolate any point in time at which [the "client"] became a "former client" and relies solely on the fact that the last piece of business [the firm] was called upon by [the "client"] to handle preceded the filing of the . . . action by four years.


*Heathcoat v. Santa Fe Int'l. Corp.*, 532 F. Supp. 961 (E.D. Ark. 1982). A law firm did a simple will for a client in 1966. In 1982 she moved to disqualify the firm in a case involving whether misrepresentations had been made to her in the sale of property. The only event that intervened was the firm sent her a "dear friends" letter about its services. The court refused to disqualify the firm.

*Gray v. Gray*, 2002 Tenn. App. LEXIS 675 (Tenn. App. September 19, 2002). Lawyer did a will for a client and then nothing further for that person for ten years. The court held that, ten years later, the lawyer could be adverse to the person, even though the lawyer had not written a termination letter after completing the will.
Ferguson Electric Co. v. Suffolk Construction Co., 1998 Mass. Super. LEXIS 289 (Mass. Super. 1998). The lawyer was not clear in communications with the client that the work had been completed and the relationship terminated, so the court found a current relationship.

Abbott Laboratories v. Centaur Chem. Co., Inc., 497 F. Supp. 269 (N.D. Ill. 1980). An outside lawyer was handling an administrative proceeding for a company. When the matter reached a stage of relatively little activity, it was turned over to an in-house lawyer. After about 11 months the outside lawyer showed up on the other side of another matter. The company claimed that it was a current client because it "might" have to involve the lawyer again in the earlier matter. The court did not buy that argument and refused to disqualify the lawyer in the later matter.

Mindscape, Inc. v. Media Depot, Inc., 973 F. Supp. 1130 (N.D. Cal. 1997). Although the firm claimed the representation had ended, the court noted that the firm still had not cleaned up a patent mistake it had made, the firm still had a power of attorney from the "client," and the firm had never specifically advised the "client" that the representation had ended. Accordingly, the court found that the relationship was a current-client one.

“Framework” Retainer Agreements. Banning Ranch Conservancy v. Superior Court, No. 2011 Cal. App. LEXIS 316 (Cal. App. March 22, 2011). The client and law firm had retainer agreements that provided that the terms would apply for each new matter. In construing the agreements the court held that the agreements did not mean that the client would remain a client after the work terminated.

Voicenet Communications, Inc. v. Pappert, 2004 U.S. Dist. LEXIS 6429 (E.D. Pa. April 5, 2004). Fifteen months passed since the last work. The court held that the client became a former client.


In Schiefler v. Warner, Norcross & Judd, 2006 Mich. App. LEXIS 471 (Mich. App. Feb. 23, 2006), the firm had represented the co-owner of a closely-held entity "for decades," so it could not claim that he recently became a former client, so that it could be adverse to him in litigation.
Medical Diagnostic Imaging, PLLC v. Carecore Nat., LLC, 2008 U.S. Dist. LEXIS 23596 (S.D.N.Y. March 25, 2008). Two doctors affiliated with a defendant intervened in this case to move to disqualify a law firm for the plaintiffs. In a highly fact-intensive analysis the magistrate judge, in this opinion, held that the doctors were former, not current, clients of the law firm, even though the doctors pointed to circumstances suggesting they were current clients.

Rohm & Haas Co. v. Dow Chem. Co., 4309-CC, (Del. Ch. Feb. 12, 2009). Wachtell represented Dow in 2007 and 2008 in an employment matter. It later represented Rohm & Haas in this case against Dow. Dow moved to disqualify Wachtell, on both current client and former client principles, and in this brief letter opinion the chancellor denied the motion. In mid-2008 Wachtell, without objection from Dow, wound up across the table from Dow, representing Rohm & Haas in merger negotiations with Dow. That, the court said, should have been notice to Dow that Wachtell was no longer its law firm, thus dispensing with Dow's current client argument.

Applied Tech. Ltd. v. Watermaster of Amer., Inc., 2009 U.S. Dist. LEXIS 25183 (S.D.N.Y. Mr. 26, 2009). The court did not find that the client was a current client of a law firm even though the law firm had sent the former client a “client file release form” and a newsletter. The law firm said it sent those items to all current and former clients.

Leber Associates, LLC v. The Entertainment Group Fund, Inc., 2001 U.S. Dist. LEXIS 20352 (S.D.N.Y. Dec. 7, 2001). Plaintiff filed this action in 2000. Plaintiff moved to disqualify Defendant's law firm ("Law Firm") because Law Firm had prepared Plaintiff's will and trust in 1997. Although Plaintiff claimed continuing contacts with Law Firm since 1997, the court discounted those claims because Law Firm's partner testified that he did not remember the contacts and did not bill time for them. Thus, the court found that Plaintiff was a former, versus current, client.

Post-Estate Planning Ministerial Work not Current Representation. Yang Enterprises, Inc. v. Yang, 2008 Fla. App. LEXIS 11865 (Fla. App. Aug. 7, 2008). This is an unremarkable opinion affirming the trial court’s denial of a motion to disqualify. The movant had waited years to make the motion. While the decision was based largely on a waiver by passage of time, the court made this interesting statement as to whether the client was current or former:

Petitioners argued below that they are current clients of Broad and Cassel and relied primarily on two cover letters sent from a paralegal in Broad and Cassel's Orlando office in 2004 and a paralegal's bill for minor changes to their estate file in 2007. None of these acts indicated a continuing legal
representation, but rather they were ministerial tasks performed to update the completed estate planning documents.

_Carnegie Cos., Inc. v. Summit Props., Inc._, 2009 Ohio App. LEXIS 3973 (Ohio App. Sept. 9, 2009). Law firm was sloppy regarding its engagement letter and lack of a termination letter. As a result, the trial court’s finding of current client not against the manifest weight of the evidence.

_Written Retainer Controlled. California Earthquake Auth. v. Metropolitan West Securities, LLC_, 2010 U.S. Dist. LEXIS 44016 (E.D. Cal. May 5, 2010). In 2002 Law Firm and a state agency (“Agency”) entered into a written retainer agreement. Among other things, the agreement provided that Law Firm would have to give Agency thirty days written notice if it intended to terminate the relationship. Law Firm did three hours work for the Agency during 2002 and did no work for Agency after that. Law Firm never gave Agency written notice of termination. In 2009 Law Firm appeared for the defendant in this case adverse to Agency. Agency moved to disqualify Law Firm, and in this opinion the court granted the motion. Basically, the court said that the absence of written notice of termination meant that Agency was a current client of Law Firm. The court further said that written contracts between lawyers and clients should be "read expansively and not parsed to favor the lawyer."

_Revise Clothing, Inc. v. Joe’s Jeans, Inc._, 2010 U.S. Dist. LEXIS 12766 (S.D.N.Y. Feb. 1, 2010). The court refused to find that Plaintiff was a "current" client of Law Firm, noting: (1) the earlier retainer was narrow, and the matter had terminated; (2) the fact that the settlement agreement of the earlier matter designated Law Firm to receive notice for Plaintiff was not determinative; and (3) the fact that Law Firm continued to send promotional E-mail bulletins ("blasts") to Plaintiff was also not determinative.

_Laclette v. Galindo_, 109 Cal. Rptr. 3d 660 (Cal. App. 2010). The issue was whether the California one-year statute of limitations was tolled by the defendant/lawyer's continuing representation of the plaintiff/client. In this opinion the appellate court held there was a triable issue whether the client reasonably believed the representation continued. There had been an agreement to settle the underlying dispute, which required continuing payments by the parties, and the defendant/lawyer had remained counsel of record in the underlying matter.

_The Gerffert Co., Inc. v. Dean_, 2011 U.S. Dist. LEXIS 15530 (E.D.N.Y. Feb. 16, 2011). Factors leading to conclusion that the relationship was current included the "absence of an expressed cessation" of the relationship, Lawyer's continuing to send invoices to the defendant, and continuing offers to mediate the dispute among the parties.
Poor illustration but one nonetheless, *Roderick v. Ricks*, 54 P.3d 1119 (Utah 2002).


**What is "Substantial Relationship"?**

Model Rule 1.9(a) is quoted in the Introduction. It specifically adopts the "substantial relationship" rubric. Comments [1], [2], and [11] contain some language suggesting a definition. New Comment [3], adopted by the ABA House of Delegates in February 2002, does a pretty good job of explaining what it is. It begins with the following language, then follows with a number of examples:

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, . . .

The Restatement attempts to define "substantial relationship" in the black letter of § 132, and is similar to the above comment:

(1) the current matter involves the work the lawyer performed for the former client; or

(2) there is a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the former client, unless that information has become generally known.

The ABA Model Code did not use the term at all. The judge in *T.C. Theatre Corp. v. Warner Brothers Pictures, Inc.*, 113 F. Supp. 265 (S.D.N.Y. 1953), introduced it in the following sentence:

The former client need show no more than the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client.

(emphasis added)
The court did not attempt a comprehensive definition of the term, but did apply it to facts before the court. The court said:

In sum, enough appears to show that Mr. Cooke's present representation deals with matters as to which his former client reposed confidence[s] in him. Hence, I hold that Mr. Cooke is disqualified from acting as counsel for the plaintiff in this case in any capacity so long as Universal is a party defendant, and the motion is granted to this extent.

Thus, the use of confidences gained from the former client plays an important role in application of the substantial relationship standard. This point is made in Professor Wolfram's article, Charles W. Wolfram, *Former-Client Conflicts*, 10 Geo. J. Legal Ethics 677 (1997). This is a terrific article that covers the subject of the title comprehensively. Anyone wanting an exhaustive review of a great number of cases and ethics opinions should start with Professor Wolfram's article. He points out that while the two pillars of conflict of interest rules are loyalty and confidentiality, loyalty plays (or at least should play) little or no role in defining responsibilities to former clients. Professor Wolfram also notes that most of the cases, and the better decided ones, emphasize "the client's legitimate expectation in the confidentiality of information imparted to the lawyer."

California's Rule of Professional Conduct 3-310(E) does not use the "substantially related" terminology, but its emphasis is the same:

A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

Following are examples of the different ways courts articulate the substantial relationship test. *Analytica v. NPD Research, Inc.*, 708 F.2d 1263 (7th Cir. 1983) is frequently cited. It said that a substantial relationship exists if a "lawyer could have obtained confidential information in the first representation that would have been relevant in the second." The court said that it is irrelevant whether the lawyer actually obtained such information. In *Integrated Health Services of Cliff Manor, Inc. v. THCI Co. LLC*, 327 B.R. 200 (D. Del. 2005), the court quoted language from *Satellite Fin. Planning Corp. v. First Nat’l. Bank of Wilmington*, 652 F. Supp. 1281, 1284 (D. Del. 1987) cautioning that courts should not:
"allow [their] imagination[s] to run free with a view to hypothesizing conceivable but unlikely situations in which confidential information 'might' have been disclosed which would be relevant to the present suit".

Substantial Relationship in New Jersey. City of Atlantic City v. Trupos, 2010 N.J. LEXIS 386 (N.J. April 26, 2010). The New Jersey Supreme Court announced this rule:

. . . for purposes of RPC 1.9, matters are deemed to be "substantially related" if (1) the lawyer for whom disqualification is sought received confidential information from the former client that can be used against that client in the subsequent representation of parties adverse to the former client, or (2) facts relevant to the prior representation are both relevant and material to the subsequent representation.


In Harsh v. Kwait, 2000 Ohio App. LEXIS 4636 (Ohio App. 2000), the court said that matters were substantially related if there is some "commonality of issues" or "clear connection" between the matters.

In Reardon v. Marlayne, 416 A.2d 852 (N.J. 1980), the court said that a substantial relationship exists where the "adversity between the interests of the attorney's former and present clients has created a climate for the disclosure of relevant confidential information."

Kentucky abandoned the "appearance of impropriety" standard when it adopted its version of the Model Rules. Nevertheless, the court in Lovell v. Winchester, 941 S.W.2d 466 (Ky. 1997), applied it in a former client situation and ordered the lawyer disqualified. There the lawyer had obtained information from a client but claims he did not remember any of it. The Arkansas Supreme Court also based a former representation disqualification on an appearance of impropriety, even though Arkansas had adopted the Model Rules, McAdams v. Ellington, 970 S.W.2d 203 (Ark. 1998).

Importance of Loyalty in Former Client Analysis. In re I Successor Corp., 321 B.R. 640 (S.D.N.Y. 2005). The court said that loyalty was just as important as confidentiality. Pound v. Cameron, 36 Cal. Rptr. 3d 922 (Cal. App. 2005), takes the majority view that confidentiality is key.
**Lawyer Attacking Work Done for a Former Client ("Own Work").** While it is our view that the focus on former-client cases is, or should be, on preserving the former client’s confidences or not using former client’s confidences against the former client, an exception has been expressed by some. That is, a lawyer may not harm a former client by attacking the work the lawyer had done for the former client. For example, a lawyer should not attack a patent the lawyer had obtained for the former client. Restatement § 132 cmt. d(ii) takes this view. Texas Rule 1.09(a)(1) also contains this rule. Cases that follow the rule are *Oasis West Realty, LLC v. Goldman*, 2011 Cal. LEXIS 4370 (Cal. May 16, 2011) (lawyer should not have lobbied against project that he earlier worked on); *Franklin v. Callum*, 782 A.2d 884 (N.H. 2001), *Sullivan County Regional Refuse Disposal Dist. v. Town of Acworth*, 686 A.2d 755 (N.H. 1996), and *In re Basco*, 221 S.W.3d 637 (Tex. 2007). Hazard, Hodes, & Jarvis discuss the concept at §13.6. Cases cited in the Reporter’s Note to Restatement § 132 cmt. d(ii) are: *Griffith v. Taylor*, 937 P.2d 297 (Alaska 1997); *In re Breen*, 830 P.2d 462 (Ariz. 1992); *Gilbert v. Nat’l. Corp. for Housing Partnerships*, 84 Cal. Rptr. 2d 420 (N.Y. App. 2001). Florida Bar ethics opinions that agree with the Restatement are Fla. Ops. 68-16 (1968) and 59-32 (1960). Similar language appears in the Comment to Florida Rule 4-1.9. *Greater Vancouver Reg’l Dist. v. Melville*, 2007 BCCA 410 (CanLII) (Ct. App. of Brit. Col. Aug. 9, 2007) (rule implied). *Exterior Systems, Inc. v. Noble Composites, Inc.*, 175 F. Supp. 2d 1112 (N.D. Ind. 2001) is somewhat related.

. . . **What If the Work Being Attacked no Longer Belongs to Former Client?** In *Telectronics Proprietary, Ltd. v. Medtronic, Inc.*, 836 F.2d 1332 (Fed. Cir. 1988), a lawyer who worked for a client on a patent application could later challenge the validity of the patent because the patent had been assigned to a company that the lawyer had never represented. Similarly, in *Alchemy II, Inc. v. YES! Entertainment Corp.*, 844 F. Supp. 560 (C.D. Cal. 1994), the court, citing *Telectronics*, held that a law firm that had defended a copyright could later argue its limits where the law firm was not opposing a former client, but rather a licensee.


defendants filed a third-party action against Gemstar. Gemstar moved to disqualify Dorman, because Dorman previously represented Gemstar as lead counsel in all its patent litigation. Dorman had also counseled Gemstar on a license agreement that is the subject of this action. The court found that there was a substantial relationship between this litigation and what Dorman had done for Gemstar previously, and ordered that Dorman be disqualified. In Asyst Techs., Inc. v. Empak, Inc., 962 F. Supp. 1241 (N.D. Cal. 1997), the court disqualified a law firm challenging two patents that members of the firm had prosecuted on behalf of the other side. Here are two more patent infringement cases where the court did not find a substantial relationship, Talecris Biotherapeutics, Inc. v. Baxter Int’l Inc., 491 F. Supp. 2d 510 (D. Del. 2007), and Arctic Cat, Inc. v. Polaris Industries Inc., 2004 U.S. Dist. LEXIS 25463 (D. Minn. Dec. 20, 2004).


Real Estate Litigation. Henery v. 9th St. Apt., L.L.C., 2001 Neb. App. LEXIS 117 (Neb. App. 2001). Sherrets represented Cutler in the purchase of a downtown Omaha lot. Sherrets now represents Henery in connection with a lot that abuts Cutler's lot. Henery claims that underground footings for his building extend onto Cutler's lot, and he seeks to have Cutler enjoined from developing his property in a way to jeopardize Henery's building. Cutler moved to disqualify Sherrets. The Court of Appeals affirmed the trial court's denial of the disqualification. The court held that the two matters were not substantially related because Sherrets was not aware of the footings when he represented Cutler in purchasing his lot, and the "encroaching footings" simply played no role in that transaction. For a similar analysis, see R.I. Op. 2001-08 (November 8, 2001). A lawyer assisted a client in connection with developing Parcel A two years ago. Now another client wants the lawyer to assist it in developing Parcel B, which adjoins Parcel A. The opinion says that the second representation does not necessarily violate the "substantial relationship" test of Rhode Island Rule 1.9.


Malpractice. In Damron v. Herzog, 67 F.3d 211 (9th Cir. 1995), the court held that taking on a substantially related matter against a former client creates a malpractice cause of action against the lawyer.

Lawyer Fee Auditor Attempts to Oppose Former Audit Client. Ehrich v. Binghamton City School District, 210 F.R.D. 17 (N.D.N.Y. 2002), is unique. A lawyer had a side business conducting audits of legal fees. He did this for the defendant school district. After he ceased doing this for the school district, he attempted to handle a case adverse to the district. The court disqualified him because he had audited the legal fees for this very case.

City as Former Client; Changed Administrations. Valdez v. Pabey, 2005 U.S. Dist. LEXIS 38311 (N.D. Ind. Dec. 27, 2005). Law firm represented city for many years. When mayors changed, the law firm was out. Law firm then attempted to represent plaintiffs against the city. The court said that the new administration would have a different approach to issues. Therefore, it was unlikely that the law firm would have learned anything while representing the city that would be prejudicial to the city in this case.


S.C. Op. 05-05 (February 2005) holds that a lawyer who represented the purchaser of a home cannot later represent the homeowners’ association in attaching a lien to the former client’s home.

_Court Construes “Personally and Substantially” Test in Rule 1.11(a) (Former Government Lawyer Rule)._ Franklin v. Clark, 454 F. Supp. 2d 356 (D. Md. 2006).


_Follow the Assets._ Hoelscher v. Baggett, 2008 U.S. Dist. LEXIS 30713 (W.D. La. April 15, 2008). Prior to this action Lawyer represented Plaintiff personally in the purchase of business assets (“the Assets”). Plaintiff transferred the Assets into a company Plaintiff formed with a defendant in this case (Defendant). In this case Plaintiff claims Defendant wrongfully transferred the Assets to yet another business. Defendant’s law firm (“Law Firm”) in this case employs Lawyer. For that reason Plaintiff moved to disqualify Law Firm. In this opinion the district judge affirmed the magistrate judge’s denial of the motion. The court held that the earlier representation was only superficially related to this case.

_D.C. Op. 343 (Feb. 2008)._ This opinion discusses the extent to which a precisely defined and limited engagement with Client No. 1 can save a lawyer from disqualification in a later representation against Client No. 1 on behalf of Client No. 2.

_Niemi v. Girl Scouts of Minn._, 2009 Minn. App. LEXIS 129 (Minn. App. July 14, 2009). In this case Plaintiff sued Girl Scouts for employment discrimination. Lawyer represents Girl Scouts. Twenty-five years prior to this case Lawyer had represented Plaintiff in an employment discrimination case against another employer. Plaintiff moved to disqualify Lawyer in this case, and the trial court granted the motion. In this opinion the appellate court reversed. The opinion contains an excellent discussion of the role of obsolete information in a case that is otherwise "substantially related" to the earlier matter.
What is “Materially Adverse”?  

For a lawyer to run afoul of Model Rule 1.9(a), the new matter must be “materially adverse” to the former client. Obviously, taking on a litigation matter against the former client is being materially adverse. But, what about taking on a new matter against a third party (not against the former client), the result of which, if you are successful, will somehow harm the former client.

There is not much authority on what is “materially adverse.” Before the changes to the Model Rules in 2002-2003, Comment [1] to Rule 1.9 contained this sentence:

The principles in Rule 1.7 determine whether the interests of the present and former clients are adverse.

Rule 1.7 uses the term “directly adverse.” One might conclude from the quoted sentence that “materially adverse” is the same as “directly adverse.” In ABA Op. 99-415 (1999) (dealing with former in-house lawyers being adverse to their former employers) the Committee seemed to conclude as much. That was also the conclusion in Simpson Performance Products, Inc. v. Robert W. Horn, P.C., 92 P.3d 283 (Wyo. 2004), a rare and thoughtful opinion attempting to deal with the phrase “materially adverse” as used in Ruled 1.9. What the court failed to note was the deletion of the quoted sentence from Comment [1] by the ABA House of Delegates a year or so prior to the court’s opinion. Obviously, the Wyoming version of Comment [1] had not changed, and, according to the Wyoming court Web site, still has not changed.

We attempted to find out from those close to the Ethics 2000 project why the sentence in question was deleted. Our contacts could not recall. The “legislative history” at the ABA Web site does not mention the change. One academic, for whom we have great respect, and who also has no recollection, said as follows:

[M]y own view is that “directly adverse” [used in Model Rule 1.7] is a much stricter standard. Keep in mind that “directly adverse” conflicts trigger an obligation not to take a position so far adverse to your own client that it would significantly undermine the client’s ability to trust you, regardless what effect it might have on the matter in which you are representing the client. “Materially adverse” under 1.9 means that there is a significant risk that the client information you have could be used in a manner that would harm that client.

We will adopt that distinction until a better one comes along.
A number of cases have dealt with the “adversity” feature of Rule 1.9, but not with the care or precision of the Wyoming Supreme Court in Simpson Performance. In some cases, the court does not even mention its own version Rule 1.9. Other cases predate the Model Rules or have ethics rules without an analogue to Rule 1.9. Yet, they manage to deal with the need for some sort of adversity for the rules on former clients to engage. Here are the ones, of which we have knowledge: Admiral Ins. Co. v. Heath Holdings USA, Inc., 2005 U.S. Dist. LEXIS 16363 (N.D. Tex. Aug. 9, 2005); In re Jones & McClain, LLP, 271 B.R. 473 (W.D. Pa. 2001); SIPA Protection Corp. v. R.D. Kushnir & Co., 246 B.R. 582 (N.D. Ill. 2000); McPhearson v. Michaels Co., 117 Cal. Rptr. 2d 489 (Cal. App. 2002) (Cal. Rule 3-310(E) just says “adverse”); Fiddelman v. Redmon, 623 A.2d 1064 (Conn. App. 1993); Jerry Lipps, Inc. v. Postell, 229 S.E.2d 78 (Ga. App. 1976); In re Estate of James M. Ragen, Jr., 398 N.E.2d 198 (Ill. App. 1979); Adoption of Erica, 686 N.E.2d 967 (Mass. 1997); In re Epic Holdings, Inc., 985 S.W.2d 41 (Tex. 1998) (Texas’ version of Rule 1.9 just says “adverse”); State of West Virginia v. Hamilton, 430 S.E.2d 569 (W. Va. 1993).

"Accommodation Client."

This is an expression that appears in a series of cases where the courts did not believe that slavish adherence to the substantial relationship test did real justice. They had several aspects in common. Each involved a multiple representation, in which one client was a substantial, long-standing client, the "primary client," and the other was temporary, the "accommodation client." The nature of the cases was such that the accommodation client would have no expectation that anything the lawyer learned from the accommodation client would not be shared with the primary client. As noted above, the expectation of confidentiality is usually the rationale for application of the substantial relationship test.

This concept is discussed in the Restatement at § 132, Comment i. The Reporter's Note to cmt. i lists the following cases, in which the courts applied some form of the "accommodation client" theory: Allegaert v. Perot, 565 F.2d 246 (2d Cir. 1977); American Special Risk Ins. Co. v. Delta America Ins. Co., 634 F. Supp. 112 (S.D.N.Y. 1986); E.B. Marks Music. Inc., 558 F. Supp. 57 (S.D.N.Y. 1983); and Anderson v. Pryor, 537 F. Supp. 890 (W.D. Mo. 1982). One case that post-dates the Restatement, in which the court refused to apply the "accommodation client" distinction was Universal Studios, Inc. v. Reimerdes, 98 F. Supp. 2d 449 (S.D.N.Y. 2000). It distinguishes Allegaert, but does not mention the other cases noted above. Another recent case that adopts the Allegaert approach and cites the


G. D. Mathews & Sons Corp. v. MSN Corp., 763 N.E.2d 93 (Mass. App. 2002). The disqualified law firm tried to make an accommodation client argument, but did so only in a footnote in its brief. The court was unimpressed and rejected the argument without discussing it.

Parties Reversed. In Ucar Int'l. Inc. v. Union Carbide Corp., 2002 U.S. Dist. LEXIS 21766 (S.D.N.Y. November 8, 2002), a lawyer for the "principal" client joined the firm now representing the "accommodation" client. His new firm, in the face of a motion to disqualify, argued that the "principal" client would have had no expectation of confidentiality when the parties were aligned. Not so, said the court, who disqualified the new law firm.
Parties in Prior Case on Equal Footing. Goldfarb v. Kuhl, Ct. of Common Pleas, Philadelphia County, 1st Jud. Dist. of Pa., No. 1825 (Oct. 24, 2005). A family-owned business originally had three owners, A, B, and C. They had a falling out, and, in a case prior to this case, C sued A and B. Law firm X represented A and B. That case settled with A and B buying out C. Firm X had no further involvement with A. A and B subsequently had a falling out, and A sued B (this case). Firm X appeared for B. A petitioned the court to enjoin X from representing B. The court denied the petition, holding that, while this case is substantially related to the prior case, A had no expectation in the prior case that X would not share all A’s information with B. This is the rationale for the “accommodation client” cases, except that here, A and B appeared to have been on equal footing in the earlier case insofar as X's representation of them was concerned. The author will keep this opinion in a PDF file. Anyone wanting a copy need only E-mail him at william_freivogel@ars.aon.com.

Law Review. For an excellent and concise discussion of some of these cases, see Douglas R. Richmond, Accommodation Clients, 35 Akron L. Rev. 59 (2001).

Playbook

We are borrowing terminology used by Professor Charles Wolfram in his outstanding article cited above. Those familiar with materials published by Attorneys' Liability Assurance Society have seen the phrase "unique insights" to describe the same concept. The issue is when does a lawyer learn enough about the former client's thought processes and procedures that the new representation may be deemed "substantially related" to the former one.

Outside Counsel - Disqualified. In the following cases lawyers or law firms were disqualified because of the insights they had gained while working for a former client. The courts focus on concepts such as "attitudes," "litigation philosophy," "procedures," "strategies," "policies," and the like. Frequently, the former relationship had been lengthy. Moreover, the courts emphasized the nature of confidential information the lawyer had gathered. The courts deal with confidences in different ways. Many say that there is a presumption that the lawyer has learned confidences from the former client or has shared former client
In In re: A&T Paramus Co., Inc., 1999 Bankr. LEXIS 1841 (D.N.J. 1999), the court recognized that knowledge of "litigation strategy, methods and procedures for defending claims" can fall within the substantial relationship test, but found that the lawyer had not gained enough information to warrant disqualification.

Jessen v. Hartford Cas. Ins. Co., 3 Cal. Rptr. 3d 877 (Cal. App. 2003). James Wilkins is attempting to represent the plaintiff in a coverage action against Hartford. Until 1992 Wilkins, at another firm, had represented Hartford in coverage disputes in approximately 20 different matters. Hartford moved to disqualify Wilkins in this case. The trial judge denied the motion because similar motions by Hartford against Wilkins had been denied in two federal district court cases. Thus, the trial court held, Hartford was estopped from making the motion in this case. The appellate court reversed, for reasons, it said, contained in an “unpublished portion” of its opinion. (The portion is indeed unpublished; it does not appear at all.) The appellate court remanded the case to the trial court with directions “to rehear the motion and, in doing so, to apply the substantial relationship test.” For some reason, not at all clear from the opinion, the appellate court felt compelled to describe at great length the nature of the substantial relationship test in California. For another case involving Wilkins and his disqualification, see Farris v. Fireman’s Fund Ins. Co., 14 Cal. Rptr. 3d 618 (Cal. App. 2004).


Lawyer/Testifying Expert Treated Like Lawyer, and Playbook Analysis Applied. Brand v. 20th Century Ins. Co., 21 Cal. Rptr. 3d 380 (Cal. App. 2004). Helen Brand sued her insurance company in a coverage dispute. She hired lawyer Barry Zalma as an expert witness on insurance coverage issues. Twelve years prior Zalma had represented the insurance company on coverage and related matters. The insurance company moved to disqualify Zalma as Brand’s expert witness.
The trial court denied the motion. In this opinion the appellate court reversed, finding a substantial relationship between what Zalma had done for the insurance company and the issues in this case.

*Former In-House Lawyers - ABA Op. 99-415 (1999).* This opinion says that the mere fact a lawyer was in a company's law department does not mean that the company was a former client for all matters that were pending when the lawyer was there. Nor, does the fact that the lawyer had overall supervisory responsibility over lawyers who were representing the company mean that the company is a former client. If the lawyer was involved to the extent that the company would be deemed a client on that matter, the lawyer can later cure any conflict with consent of the company under Rule 1.7(a). If such a consent requires the lawyer to maintain confidences that relate to the new representation, the lawyer will also have to consider obtaining a Rule 1.7(b) consent from the new client. The opinion also reminds readers that the lawyer may have obtained confidences at the company requiring the lawyer's (and the lawyer's new law firm) to be disqualified under Rule 1.9(b). (As to the ability to avoid the firm's disqualification with a screen, see the section entitled, "Changing Firms - Lawyers and Non-Lawyers.") The following state ethics opinions are in accord with ABA Op. 99-415: Ariz. Op. 94-06 (1994); N.J. Op. 654 (1991); and Va. Op. 1399 (1991). But, see Mich. Op. RI-35 (1989).


*Former In-House Lawyer not Disqualified.* Caldwell-Gadson v. Thompson Multimedia, SA, 2000 U.S. Dist. LEXIS 16087 (S.D. Ind. October 11, 2000). Plaintiff sued several companies for copyright infringement and plagiarism. Her husband, who was formerly Senior Patent Counsel for one of the defendants now represents her. The defendants moved to disqualify the husband under the
substantial relationship test of Rule 1.9(a). The court held that although the husband had worked on similar matters while with the defendant, he had not worked on that matter and denied the motion. The court said:

This case is much like the example given in the comment to Rule 1.9: "[A] lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client."

To the same effect, see Jamaica Pub. Serv. Co. v. AIU Ins. Co, 684 N.Y.S.2d 459 (N.Y. 1998). In Wisdom v. Philadelphia Housing Authority, 2003 U.S. Dist. LEXIS 2055 (E.D. Pa. Feb. 12, 2003), the issue was whether the plaintiff had sent her complaint letter on time, so the court was not impressed that the lawyer had gained knowledge of the former client's approach to handling complaints. In Jordan v. Philadelphia Housing Authority, 337 F. Supp. 2d 666 (E.D. Pa. 2004), the former in-house lawyer got disqualified because he tried to use an earlier case he had handled for the Authority in this case.


Not Disqualified, but Unique Facts. Walker v. State of Louisiana, 817 So. 2d 57 (La. May 15, 2002). For ten years, until 1999, Daniel Vidrine worked in the “Road Hazard Section” of the Louisiana Attorney General’s Office. When he went into private practice, he sent letters to “various Louisiana attorneys” saying that he was:

. . . very informed in the inner operations of the Department of Transportation and Development as well as the location of valuable written documents which are essential in proving a case against the DOTD.

Shortly after leaving the state, Vidrine took on a highway case for a plaintiff against the state. The court denied the state's motion to disqualify Vidrine, because the state had not shown that Vidrine had any confidential information relating to this particular case. The court said that merely handling the same type of case as that he had handled while with the state was not enough to disqualify him.

Vivid Articulation of Playbook Analysis. Hurley v. Hurley, 923 A.2d 908 (Me. 2007). Wife hired Lawyer to represent her to recover her damages resulting from
an automobile accident. After that case concluded, Husband hired Lawyer to represent him in a divorce proceeding against Wife. Wife moved to disqualify Lawyer, the trial court granted the motion, and in this opinion the supreme court affirmed. In addition to noting that Lawyer learned about Wife’s health and earnings history, the court said:

[F]or over two years [Lawyer] observed [Wife’s] reaction to the numerous tribulations of the litigation process. [Lawyer] personally observed: [Wife’s] ability to testify under oath, her reactions to her adversary, her patience with the protracted process, her ability to accept compromise, her ability to handle stress, and the way in which she relates to her attorney. Disclosing knowledge of [Wife’s] strengths and weaknesses in these areas would be detrimental to her interests in another litigation, particularly in a contentious divorce action.


Nursing Home Neglect Cases Different from Product Liability Cases. Health Care and Retirement Corp. of Amer., Inc. v Bradley, 961 So. 2d 1071 (Fla. App. 2007). Lawyer had represented a nursing home chain for more than three years. Many of those cases (none of them this case) involved pressure ulcers and falls, as does this case. Lawyer has joined Law Firm, which has sued that same nursing home chain in a case (this case), which involves pressure ulcers and falls. The trial court denied a motion to disqualify lawyer, and in this opinion the appellate court affirmed (denied cert.). The court distinguished an earlier case in which a lawyer had defended a certain type of lawnmower and later sued the manufacturer involving the same type of lawnmower:

Here, [Lawyer] handled a "type of problem" for Manor Care-negligence cases involving patients who suffered from pressure ulcers or falls; the current case, filed after [Lawyer] left [his prior firm], is a "wholly distinct problem of that type." Rules Reg. Fla. Bar 4-1.9 cmt. (2006). Unlike two products liability cases involving the identical product, each negligence case turns on its own facts. Therefore, the work in this case does not involve [Lawyer] "attacking [the] work that [Lawyer] performed for the former client." Id. This lawsuit is not "substantially related" to the earlier cases within the meaning of Rule 4-1.9(a).

Restatement. See cmt. d(iii) to § 132, particularly the last paragraph of that comment.

Treatise. Hazard, Hodes, & Jarvis § 13.7.
Advance Waivers

The situation is as follows: A lawyer takes on a single piece of business for a very large company that will result in fees totaling $20,000. The lawyer has little reason to believe that the company will give the lawyer any other business. May the lawyer ask the company to waive an objection to future matters in which the lawyer is asked to represent some other client against the company on some completely unrelated matter – even before the original matter is completed?

Almost all authorities agree that such an arrangement is not per se unethical, at least as to private entities (as to public entities see the paragraph entitled "Governments," below). The problem is that, depending upon the facts and the tribunal, any number of things can result in such a waiver not being enforceable. The key issues will be (1) whether the future "unrelated" matter is adequately identified, (2) whether the party giving the waiver is adequately sophisticated, (3) whether the waiver is recent enough, and (4), in some cases, whether the waiving party had an opportunity to seek independent counsel’s advice on giving the waiver. So far, no two courts have treated these issues the same.

Comment [22] to new Model Rule 1.7, adopted by the ABA House of Delegates in February 2002, provides as follows:

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case,
advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

A number of courts and ethics committees have addressed the efficacy of such waivers. We will attempt to separate them into two basic categories: opinions favorable to advance waivers; and opinions not favorable.


Magistrate Judge Hostile to Advance Waiver. Celgene Corp. v. KV Pharm. Co., 2008 U.S. Dist. LEXIS 58735 (D.N.J. July 29, 2008). Law Firm is defending this patent infringement case. The plaintiff is a current client of Law Firm on other matters. The plaintiff moved to disqualify Law Firm, and in this opinion, a magistrate judge granted the motion. Law Firm had obtained advance waivers from the plaintiff that said that Law Firm could be adverse to the plaintiff and specifically included “litigation” in the waiver. The waivers were signed by in-house lawyers for the plaintiff. The court based part of its decision on the fact that the waivers did not specify what sorts of matters were included and what other parties might be involved. The court also held that the term “substantially related” was ambiguous.

In McKesson Information Solutions, Inc. v. Duane Morris LLP, No. 2006CV121110 (Super. Ct. Fulton Co. Ga. Nov. 8, 2006), the trial judge found an advance waiver not enforceable even though the law firm did everything it could have to document it properly. The judge ignored ABA Op. 05-436 (2005), and cited Worldspan L.P. v. The Sabre Group Holdings, Inc., 5 F. Supp. 2d 1356 (N.D. Ga. 1998). On March 8, 2007, the court reversed herself because the offending representations had ended. She did not retract her earlier position that the advance waiver in question was ineffective.


the motion court properly denied defendants' cross motion, since defendant Apple Builders & Renovators, Inc. had executed a written waiver in its retainer agreement with the same law firm specifically waiving any conflict of interest that might arise from the firm's representation of Centennial and Apple. Apple cannot compel the disqualification of plaintiff's counsel simply because the representation to which it consented has since devolved into litigation (see St. Barnabas Hosp. v New York City Health and Hospitals Corp., 7 AD3d 83, 92, 775 N.Y.S.2d 9 [2004]). Apple's claim that it did not understand the implications of the waiver is unsupported by the clear language of the retainer agreement and the record evidence.
ABA Op. 05-436 (May 11, 2005). In this opinion the Committee has withdrawn ABA Op. 93-372. In conformance with new Comment [22] to Model Rule 1.7 (see above), the Committee said that an “open-ended” advance waiver may be effective where the person giving it is sophisticated or represented by other counsel on the waiver issue.


D.C. Rule 1.7 cmts. 31 & 32, effective February 1, 2007, recognize advance waivers.

Restatement. See § 122, cmt. d. It says that normally to be effective the client must be sophisticated and have an opportunity to get the advice of another lawyer.

Treatises. Hazard, Hodes, & Jarvis § 10.9; Rotunda & Dzienkowski § 1.7-4(b).


Governments. We are aware of a few jurisdictions where a waiver from a state or local government simply would not be enforced. New Jersey Rules of Professional Conduct 1.7(a)(2) & 1.7(b)(2); State of West Virginia v. MacQueen, 416 S.E.2d 55 (W. Va. 1992); and City of Little Rock v. Cash, 644 S.W.2d 229 (Ark. 1982). This may be true in other states, as well.

"Sidebar," Nat. L. J., May 22, 2000. According to this publication, a prominent Philadelphia law firm recently tried to rely on an advance waiver that was signed in 1990. Evidently, it did not work, and a state administrative tribunal removed the firm
from the matter in question. The brief article does not say whether the age of the waiver was a factor.

*The New York and Presbyterian Hosp. v. New York State Catholic Health Plan, Inc.*, Index No. 04-603640 (N.Y. Sup. Ct. May 25, 2006). The trial court disqualified a law firm, which attempted to rely on an advance waiver. In her oral ruling the judge said that a law firm could not rely on an advance waiver to be adverse to a current client in litigation. The court agreed with the other side's argument that the law firm should have obtained another waiver after it was asked to appear in this case. We believe this decision is inconsistent with virtually all the cases approving advance waivers as well as the Restatement and ethics opinions cited above
A. Corporations Generally

As will be apparent below, most of the conflict-of-interest action in the corporate area involves close corporations. For that discussion go to B. below.

Model Rule 1.13. This rule applies to corporate representation in a number of important respects. First it stands for the proposition that a lawyer retained by a corporation represents the corporation. Rule 1.13(a). That does not mean that the lawyer has an attorney-client relationship with its officers, *Innes v. Howell Corp.*, 76 F.3d 702 (6th Cir. 1996); *Lane v. Chowning*, 610 F.2d 1385 (8th Cir. 1979); *U.S. Industries, Inc. v. Goldman*, 421 F. Supp. 7 (S.D.N.Y. 1976); *Ex parte Tiffin*, 879 So. 2d 1160 (Ala. 2003) (stands for the majority view, but the analysis is not satisfactory).

Rule 1.13(b) provides important guidance to the lawyer for corporation when one of its constituents is behaving inappropriately. Rule 1.13(d) reminds the lawyer for the corporation to explain to the corporation's constituents (shareholders, officers, employees, etc.) who is, and who is not, the lawyer's client when the corporation's interests are adverse to those constituents.

B. Close Corporations

The issue that arises most frequently in connection with close corporations is whether the lawyer for a close corporation is ipso facto lawyer for the shareholders. This is apt to come up when the lawyer takes on a matter directly adverse to one of the shareholders, and the shareholder moves to disqualify the lawyer. It also comes up when one of the shareholders attempts to sue the lawyer for malpractice. In most situations, the shareholder cannot sustain the action unless the shareholder can establish that the shareholder was a client of the lawyer.

Following are two groups of cases. The first group (Group 1) contains cases in which the court either denied a motion to disqualify or found that a lawyer-client relationship did not exist for malpractice purposes. In either case, the court ruled that being a lawyer for a close corporation does not, without more, create a lawyer-client relationship with the shareholders. The second group (Group 2) contains cases in which the court held that the lawyer for the corporation had some sort of duty to one
or more shareholders. In only a small handful of those cases did the court rule that lawyer for a close corporation is ipso facto lawyer for the shareholders.

Group 2. In the following cases, the court found that the lawyer did have a duty to constituents of a close corporation client: DeFazio v. Wallis, 2006 U.S. Dist. LEXIS 58258 (E.D.N.Y. Aug. 14, 2006) (court found that CEO of corporate client reasonably believed he, too, was client); Rico Records Distributors, Inc. v. Ithier, 2005 U.S. Dist. LEXIS 19483 (S.D.N.Y. Sept. 8, 2005); Rosman v. Shapiro, 653 F. Supp. 1441 (S.D.N.Y. 1987) (just two 50% shareholders enough to distinguish above cases); Woods v. Superior Court, 197 Cal. Rptr. 185 (Cal. App. 1983) (lawyer could not handle dispute between shareholders); Opdyke v. Kent Liquor Mart, Inc., 181 A.2d 579 (Del. 1962) (lawyer had acquired interest adverse to client); Eleventh St.

Trifidus Inc. v. Samgo Innovations Inc., 2011 NBCA 59 (CanLII) (N.B. Ct. App. July 7, 2011). A defendant in this action ("Gaudet") moved to disqualify the lawyer for the plaintiffs ("Lawyer"). Earlier Lawyer had represented Gaudet in the purchase of a residence. Lawyer had also assisted Gaudet and another gentleman ("OG"), who is also a plaintiff in this case, in creating a corporation ("Corporation"), which is also a plaintiff in this case. Upon creation of Corporation Gaudet and OG became equal shareholders. The trial court granted the motion to disqualify. In this opinion the appellate court affirmed.
In Sessions v. Espy, 584 So. 2d 515 (Ala. 2002), the court held that there was not enough evidence to determine whether the lawyer also represented a shareholder.


Incorporated Associations. Shadow Isle, Inc. v. American Angus Ass’n., 1987 U.S. Dist. LEXIS 8590 (W.D. Mo. 1987), involved an incorporated trade association. Sayyah v. Cutrell, 757 N.E.2d 779 (Ohio App. 2001), involved an incorporated property owners' association. In each case the court held that the lawyer for the association was not thereby a lawyer for the members.

Credit Index, L.L.C. v. RiskWise International L.L.C., 744 N.Y.S.2d 326 (N.Y. App. July 2, 2002). The defendant's law firm had represented the majority shareholder of the plaintiff on a matter substantially related to this case. The majority shareholder remains a current client of the firm. For those reasons, the court affirmed the trial court's order granting the plaintiff's motion to disqualify the firm.

Excellent Analysis of Who Is Client. Rallis v. Cassady, 84 Cal. App. 4th 285, 100 Cal. Rptr. 2d 763 (Cal. App. 2000). This decision deals with a Statute of Limitations issue, but is an excellent primer on how a lawyer who thought he represented only a corporate entity can morph into lawyer for one of its employees. The court describes the following situations that could lead to this result and cites cases for each: (1) the lawyer has represented the individual in the past over a long period of time or in several matters; (2) the lawyer has repeated contacts with the individual while representing the corporation; (3) the individual had a particular personal interest in the matter, but did not have independent counsel; (4) the corporation gave the individual advice while representing the corporation; (5) the individual disclosed confidential information to the lawyer; or (6) the individual paid part of the lawyer's fees.

Another Excellent Analysis of Who Is Client, but Using Different Factors. Atlas Partners II, L.P. v. Brumberg, Mackey & Wall, PLC., 2006 U.S. Dist. LEXIS 983 (W.D. Va. Jan. 6, 2006). This is a legal malpractice case arising out of the creation of a series of LLCs as investment vehicles. The issue in the case relevant to us is whether the plaintiff, Atlas Partners II, Limited Partnership (“Atlas Partners”), the principal member of the LLCs, was a client of defendant law firm (“Brumberg”), and, therefore, able to sue Brumberg for malpractice. Brumberg admitted it represented the new LLCs, but denied representing Atlas Partners. All of Brumberg’s communications with Atlas Partners were through one Robert Jordan. Although Jordan was not the general partner of Atlas Partners, he was authorized by the general
partner to act on behalf of Atlas Partners. Brumberg, denying a lawyer-client relationship with Atlas Partners, moved for summary judgment on that and other bases. The court denied that part of the motion, noting the following: (1) a lawyer-client relationship need not be express; it can be implied or inferred from the circumstances; (2) Brumberg was the only law firm involved in the transactions; (3) Brumberg had multiple clients in many of the transactions; (4) Brumberg used no engagement letters in the any of the transactions; (5) Brumberg did not discuss whether or not it had a lawyer-client relationship with any of the parties; and (6) Brumberg knew its fees originated with Atlas Partners. (The court acknowledged that who pays the fees in not always determinative, but said that that factor, along with the others, made it impossible to grant summary judgment.)

Assisting Corporate Squeeze-Out. Granewich v. Harding, 985 P.2d 788 (Ore. 1999) deserves separate mention. A law firm represented a close corporation. A minority shareholder sued the law firm for "aiding and assisting" the majority shareholder in breaching his fiduciary duty to the minority shareholder. The court held that the complaint stated a cause of action. Another similar result is in Reis v. Barley, Snyder, Senft & Cohen LLC, 484 F. Supp. 2d 337 (E.D. Pa. 2007); however, the court rejected the theory in LeRoy v. Allen, Yurasek & Merklin, 872 N.E.2d 254 (Ohio 2007).

Representing Incorporators - "Relation Back." Jesse v. Danforth, 485 N.W.2d 63 (Wis. 1992); and Manion v. Nagin, 394 F.3d 1062 (8th Cir. 2005). In Jesse, a law firm had represented several doctors in setting up a corporation. After the corporation was formed, the firm represented only the corporation. Later the firm brought a medical malpractice action against two of the incorporators. They moved to disqualify the firm, based upon the earlier representation. The court ruled that the firm should not be disqualified. As to the earlier representation of the incorporators, the court said:

[W]here (1) a person retains a lawyer for the purpose of organizing an entity and (2) the lawyer's involvement with that person is directly related to that incorporation and (3) such entity is eventually incorporated, the entity rule applies retroactively such that the lawyer's pre-incorporation involvement with the person is deemed to be representation of the entity, not the person.

In Manion the court mentioned Jesse approvingly, but ruled the lawyer had given the incorporator too much individual advice to claim he represented only the entity. Ariz. Op. 02-06 (September 2002) also follows Jesse. A limited partnership case that seems to recognize the same concept is Buehler v. Sbardellati, 34 Cal. App. 4th 1527 (1995). Not so in Classic Ink, Inc. v. Tamp Bay Rowdies, 2010 U.S. Dist. LEXIS 75220 (N.D. Tex. July 23, 2010), a case involving the formation of an LLC.

Another LLC Case. *Bottoms v. Stapleton*, 706 N.W.2d 411 (Iowa 2005). A 49% owner of an LLC sued the 51% owner and the LLC. The plaintiff sought money damages from the individual defendant and injunctive relief from the LLC. It was not a derivative action. Law Firm filed an answer for both defendants. The plaintiff moved to disqualify Law Firm from representing the LLC. The trial court granted the motion. The Iowa Supreme Court reversed. The court analyzed the issues in light of Iowa’s new Rule 1.7, which is the same as the new version of ABA Model Rule 1.7. The court said that currently the interests of the defendants did not conflict, but conceded that there was a “potential” conflict. The court went on to say that “potential” conflicts are “foreign” to Rule 1.7, and that the plaintiff could re-file his motion if an actual conflict developed. *Frank Settelmeyer & Sons, Inc. v. Smith & Harmer, Ltd.*, 2008 Nev. LEXIS 116 (Nev. Dec. 24, 2008), followed *Bottoms* insofar as making a distinction between a dissolution action and derivative action.


Covered by letter. Lewis v. Professional Audio Concepts, Inc., 2002 Cal. App. Unpub. LEXIS 9619 (Cal. App. October 17, 2002). The lawyer informed the majority shareholder in a letter that the lawyer would represent the corporation and the majority shareholder "as an officer and director" but not "as a shareholder." The court held that there was, therefore, no lawyer-client relationship between the lawyer and the majority shareholder.


Single-Purpose Entity. Terracap v. 2811 Development Corp., 2010 ONSC 1183 (CanLII) (Super. Ct. Ont. Feb. 22, 2010). Action for specific performance of a contract. Law Firm represents the defendant. The plaintiff is a single purpose entity, which is part of a group of entities all controlled by one Larry Krauss and his family. Because Law Firm represents other parts of the Krauss group, and answers to Krauss personally in those matters, the master here granted the plaintiff's motion to disqualify Law Firm.

Axon v. Axon, No. 53650/09 (Kings Co.) (N.Y. S. Ct. May 24, 2010). Matrimonial action. Law Firm represents W. Law Firm has represented Company in one litigation, and continues to represent Company in another. H is the majority shareholder of Company, its president, and its chairman of the board. He has been substantially involved in Company for many years. H moved to disqualify Law Firm in this case because of its representation of Company. In this opinion the court denied the motion.
for three reasons. First, Law Firm never represented H directly. Second, there was no showing that Law Firm gained significant information about H in the Company representations. Third, there was no showing that the litigation Law Firm was handling for Company was related to this matrimonial action. In order to ensure that Law Firm did not abuse its position, the court ordered Law Firm to create a screen between the lawyers representing Company and the lawyers in this case.

Discipline. In re Shirley, 2010 Ind. LEXIS 431 (Ind. Aug. 5, 2010). Disciplinary proceeding. Lawyer had represented a family-owned corporation and one of the members of the family (not the matriarch). Over several years Lawyer took actions adverse to the corporation, the matriarch, and other members of the family. The matter came to the Indiana Supreme Court pursuant to an agreement that Lawyer would be suspended for 30 days. In this opinion approving the agreement the court noted that the punishment would have been more severe had there been no agreement. This is the second case in the last few months in which discipline resulted primarily because of a lawyer's insensitivity to conflicts rules. The other was In re Savin, 2010 Minn. LEXIS 185 (Minn. April 7, 2010).

Oppression Action. Amack v. AW Holdings Corp., 2011 ABQB 376 (Q.B. Alberta June 14, 2011). This is an action by a minority shareholder against the corporation and the majority shareholder for oppression. In this opinion the court held that the same law firm could not act for the corporation and the majority shareholder where conflicts between the corporation and majority shareholder are likely.

Ethics Opinions. Cal. Op. 2003-163 (2003) (discussing lawyer’s obligations when representing the corporation and an officer). Cal. Op. 1999-153 (1999) says that a lawyer for a close corporation may represent it and a shareholder against another shareholder. D.C. Op. 216 (1991) involves a corporation with two 50% shareholders. Where a bank seized the shares of one of them to collect a debt, the lawyer for the corporation could represent the corporation against the bank. Ore. Op. 1991-85 holds that lawyer may be able to represent one of the parties adverse to another. Mo. Op. 2000061 (2000) and R.I. Ops. 2003-02 (2003) & 93-58 (1993) say that a lawyer for a close corporation may not represent one of several shareholders against the others without the others' consent. But, in R.I. Op. 2005-10 (Nov. 10, 2005), the committee said that shareholders of a former client close corporation could not complain about lawyer's current representation. Va. Op. 1517 (1993) says that the lawyer for a close corporation can represent one shareholder in litigation against the other, so long as the lawyer has not obtained confidences from the other. D.C. Op. 328 (April 2005) considers the conflicts issues raised by a lawyer’s representation of a constituent of an organization (director, officer, owner, etc.), and not the organization, on matters relating to the organization. It says that while a lawyer may represent the constituent and not the organization, the lawyer must carefully document that the relationship to
avoid misunderstandings. The opinion then goes on to consider the circumstances under which the lawyer can then be adverse to the organization. Ala. Op. RO-2007-04 (Aug. 2007). Lawyer represents corporation with four shareholders. Several of the shareholders are feuding. In this opinion the Bar Counsel opines that Lawyer can continue representing the corporation and do legal work for one of the feuding factions on non-corporate matters. N.Y. City Op. 2008-2 (Sept. 2008) discusses the extent to which an in-house lawyer may represent other members of a corporate family. Vt. Op. 2009-4 (undated) (lawyer for "principal" owner of a corporation does not necessarily represent the corporation).

_Treatise._ Hazard, Hodes, & Jarvis §§ 17.13-17.14.


**“Underlying Work” Problem**

A partner in a law firm (Partner A) represents a client in the purchase of heavy equipment. Partner A drafted the key sales documents. A year later, the client and the seller have a disagreement over the seller's obligations if the equipment fails to perform certain tasks. In the meantime, Partner A has retired. The client comes to another partner in the law firm (Partner B) to seek assistance in resolving the dispute. If the parties cannot agree, they must, pursuant to one of the documents, submit to binding arbitration. Partner B retrieves Partner A’s files on the purchase and reviews the documents. A key provision in one of the documents that might greatly affect the result seems ambiguous. Partner B gets several "second opinions" from other lawyers in the firm. Partner B concludes that the provision is indeed ambiguous and that other lawyers in the firm have routinely been using another version of that provision that is much more clear.

Should the firm take the case? The glib answer is that it depends. On a more serious note, the issue of whether a law firm can handle a dispute when it might involve its earlier work has become seriously troubling. Law firms used to do this all the time. The problem is that conflicts of interest have become so prominent and dangerous in malpractice cases. If the law firm were to take the case, and the result is a bad one, the
client will go to another law firm for an evaluation. That law firm may very well come up with a three-part analysis that will be very difficult to counter.

"They made the wrong arguments." First, the new law firm may conclude that one of the reasons the original law firm lost the case is that it made the wrong arguments – that it avoided arguments that were apt to focus on its conduct in handling the underlying transaction.

"Did they discuss the credibility issue with you?" Second, the new law firm will point out that the original firm surely knew that it would have to call at least one of the transactional lawyers in the firm as a witness. Although most states’ versions of Model Rule 3.7 allow a lawyer to try a case even though his partner will be a witness, doing so could create credibility issues with the trier of fact. The new law firm may not be kind in its analysis of the credibility point.

“You mean they did not discuss settlement with you at all?” Last, is the question of settlement. The new law firm may conclude that the original firm did not press settlement as it should have. Part of the reasoning may very well be that the original law firm knew that because of its handling of the underlying transaction, it would have to be a third party at the settlement table. Because it did not want to focus on its own involvement and potential liability, it avoided settlement. In effect, it deprived its client of an opportunity to settle the case on terms much more favorable than the resulting verdict.

We are aware of several situations where the plaintiff’s lawyer in the resulting malpractice case made precisely these arguments, and the original law firm and its carrier(s) settled the case, rather than risk an adverse verdict or award.

A case confronting these very principles is Eurocom, S.A. v. Mahoney, Cohen & Co., 522 F. Supp. 1179 (S.D.N.Y. 1981). Large Firm attempted to represent a plaintiff in a case arising out of a transaction it had handled. The defendant moved to add Large Firm as a third-party defendant or, in the alternative, to disqualify Large Firm as counsel for plaintiff in the case. The court granted the motion to disqualify for the reasons discussed above. The court briefly discussed the lawyer-as-witness rule, but minimized its effect, because the lawyers who would have been witnesses were either dead or gone. Taking a broader view, however, the court said:

A potential conflict arises between Cleary, Gottlieb and its own client. Under Hercules [Chemical Co., Inc. v. North Star Reinsurance Corp., 72 A.D.2d 538, 421 N.Y.S.2d 67 (1st Dept. 1979)], plaintiff's recovery is subject to possible diminution by Cleary, Gottlieb fault (assumed arguendo for the sake of this discussion only). n1 If
the jury reached such a conclusion, Cleary, Gottlieb would presumably face a malpractice action, brought by its own client. In these circumstances, Cleary, Gottlieb has its own interest in minimizing its role during the underlying commercial transaction, and maximizing that of the plaintiff's own representatives, so that any factors tending to reduce plaintiff's recovery would not be laid at the door of Cleary, Gottlieb. Secondly, the theory defendant asserts against Cleary, Gottlieb constitutes an inevitable complicating factor in settlement discussions. The possibility of settlement is always encouraged by the Court; but the parties are entitled to advice on that subject from counsel who are entirely uninhibited by any personal involvement of their own in the merits.

Eurocom was a disqualification case. Yet, it would not take much effort for a plaintiff's lawyer, in the appropriate case, to transform the same reasoning into a breach of fiduciary duty claim for damages.

Another Disqualification Case. Jamieson v. Slater, 2006 U.S. Dist. LEXIS 86712 (D. Ariz. Nov. 27, 2006). Lawyer represented Husband No. 2 in dissolution action against Wife. During the dissolution proceeding Lawyer filed lis pendens against Wife’s real estate. The dissolution court, finding that Husband No. 2 had no claim to Wife’s real estate, ordered the lis pendens released. Lawyer also filed a quiet title action against Wife’s real estate on behalf of Husband No. 1. As a result of this meddling with Wife’s title, Wife filed this action against Husbands 1 and 2 and against Lawyer. Lawyer appeared for himself and Husbands 1 and 2. Wife, claiming Lawyer had a conflict, moved to disqualify Lawyer. In this opinion the court granted the motion. As to Wife’s standing, the court held that given the seriousness of the conflict, Wife did not need standing (analysis of standing not that clear). As to the conflict, the court identified various ways Lawyer’s conflicts could adversely impact not only Wife but also Husbands 1 and 2. In discussing Lawyer’s underlying work problem, the court said:

In the present case, the interests of [Husband No. 1] and [Husband No. 2] conflict with the interests of [Lawyer] because the actions of [Lawyer] while he represented [Husband No. 2] and [Husband No. 1] in lawsuits against [Wife] is the primary wrongdoing for which [Wife] seeks to recover damages. Because [Lawyer] is a named co-defendant in the present case, there is a significant risk that his ability to consider, recommend, and carry out an appropriate course of action on behalf of [Husband No. 2] and [Husband No. 1] will be materially limited as a result of his exposure to personal liability (bold and italics, the court’s).

Crews v. County of Nassau, 2007 U.S. Dist. LEXIS 6572 (E.D.N.Y. Jan. 30, 2007). This is a civil rights case arising out of the criminal prosecution of one of the plaintiffs
Plaintiff

Lawyer, who is representing Plaintiff in this case, also defended Plaintiff in the criminal case. The defendants moved to disqualify Lawyer because he would be a witness in this case, but also because he would have a conflict of interest arising out of his work on the criminal case. In this opinion the court granted the motion on both grounds. As to the latter ground, the court said in part:

If, as defendants argue, [Lawyer] erred in his representation of [Plaintiff] in state court, [Lawyer] would have a significant incentive to tailor his representation of plaintiffs in this case so as to avoid revealing or belaboring his alleged errors.

Liability Cases. In Veras Investment Partners, LLC v. Akin Gump Strauss Hauer & Feld LLP, 851 N.Y.S.2d 61 (N.Y. Misc. 2007), the law firm had advised a client on securities trading strategies. It later represented the client in investigations by the SEC and others into those very trading strategies. In this opinion the court denied a motion to dismiss parts of a complaint dealing with this alleged conflict. A follow-up opinion regarding privilege and the plaintiffs’ communications with subsequent counsel is at Veras Investment Partners, LLC v. Akin Gump Strauss Hauer & Feld LLP, 860 N.Y.S.2d 78 (N.Y. App. 2008). Brodie v. U.S. Dep’t of Justice, 2007 U.S. Dist. LEXIS 75191 (E.D. Pa. Oct. 4, 2007), appears to be another case where a law firm got sued after attempting to represent in a criminal proceeding, which involved advice the firm had given to the client before the criminal proceeding. Given the nature of the proceeding, the malpractice claim was not clearly described.

What should a firm being asked to handle the "underlying matter" do? Where no reasonable person could argue that the firm's underlying transactional work had anything at all to do with the dispute or how it is resolved, perhaps the firm simply proceeds. Where there is some doubt, perhaps the firm explains the situation to the client and asks for the client's consent to proceed. The next level of protection is to require the client to seek other counsel on the issue of whether the firm should stay in the matter. Some situations could be so serious that the firm should not proceed under any circumstances.

Ia. Op. 09-03 (Aug. 25, 2009). This is a discussion of the situation where a law firm handled a transaction and is subsequently asked to handle litigation arising out of the transaction. The opinion contains a lengthy discussion of the issues raised by the lawyer-as-witness rule, Rule 3.7, and well as the material limitation issues raised by Rule 1.7.
**Special Note on Bond Practice**

The Internal Revenue Service has been aggressively auditing tax-exempt transactions. Typically the IRS goes to the issuer for information. If the IRS believes the bond issue in question should be taxable, it will first negotiate with the issuer to see if the issuer will pay the resulting tax, rather than the bondholders. Such a resolution is called a "closing agreement." This process usually results in the issuer bringing pressure on other participants in the transaction to contribute to the settlement. Frequently, the issuer or other participant will seek help from the law firm that represented it in the original transaction. As often as not, this will be "bond counsel;" that is the law firm that issued the opinion on state law and federal income tax issues.

Should that law firm get involved in the audit? Again, it depends. Certainly, if the IRS is going after the structure of the transaction, and the law firm in question was largely responsible for that structure, the law firm may simply decline. At the other end of the spectrum, the IRS concerns may involve the conduct of one or more participants long after the law firm concluded its work. There, the law firm's prior work may simply not be an issue. In between those two situations, the law firm will have to do a careful analysis.

The law firm may recommend that the client get independent advice on the conflict issues. Or, the law firm may recommend that the client hire another law firm to be co-counsel and protect the client on conflict issues. A very important part of any analysis is the issue of whether the law firm should contribute to the settlement. One could argue that the law firm is in no position to provide the required objectivity on that issue.

The good news is that bond lawyers are becoming increasingly sensitive to these issues. The bad news is that IRS officials continue to observe law firms that are up to their necks in exposure continue to represent their clients in audits with no apparent independent supervision. It is now at the point that the IRS requires law firms in this position to obtain conflict waivers from their clients before the IRS will deal with the firm.

**Tax Court Gets It**

Whether a lawyer is taking a tax-exempt matter or some other federal tax matter to Tax Court, the Rules of Practice & Procedure of the United States Tax Court have a fairly specific provision to address the underlying work situation. Rule 24 provides as follows:
(g) Conflict of Interest: If any counsel of record (1) was involved in planning or promoting a transaction or operating an entity that is connected to any issue in a case, . . . then such counsel must either secure the informed consent of the client . . . withdraw from the case; or take whatever steps are necessary to obviate a conflict or other violation of the ABA Rules of Professional Conduct . . . . The Court may inquire into the circumstances of counsel’s employment in order to deter such violations. See Rule 201.

Other Cases

We are not aware of any other opinions that address this issue directly as those above. However, Streber v. Hunter, 221 F.3d 701 (5th Cir. 2000) is very close to being such a case and also involves tax advice and an IRS proceeding. The lawyer had given tax advice to two sisters. The IRS assessed the sisters back taxes and penalties. The sisters challenged the assessment in court, and the same lawyer represented them in that proceeding. It turned out badly for the sisters. They sued the lawyer, his firm, and others in the firm, for malpractice. The claim included the allegedly bad advice the firm gave the sisters initially and the allegedly bad advice the firm gave the sisters about the litigation. The court did not state specifically that handling both matters created a conflict of interest; however the court could not have been impressed favorably by that conduct, either. One of the sisters settled before the appeal. The Fifth Circuit affirmed the verdict for the other sister and against the lawyer, the firm, and others, for $839,000.

A case that contains an element of the underlying work problem is Chang v. Chang, 597 N.Y.S.2d 692 (N.Y. App. 1993). The court was concerned about the fact that the lawyer was handling a case in which he would have to testify about his underlying work. The case was also complicated by the fact that the lawyer was a defendant along with his clients. Nevertheless, the court's concern about the lawyer's underlying work is apparent from the following:

As a defendant himself, Mr. Cartelli (the lawyer) was in a hopelessly compromised position. He had represented the corporation in all the complained-of transactions. He was exposed to the possibility of a finding of professional malpractice or being part of a scheme to defraud. A finding against his own clients, the Changs, even as to the fifth cause of action, might well exonerate him of all liability.

Sammis v. Brobeck, Phleger & Harrison, 2002 Cal. App. Unpub. LEXIS 1896 (Cal. App. June 4, 2002). This appeal is from a summary judgment for Brobeck in a malpractice suit brought by its former client, Sammis. The case is in its early stages,
so not much significance can be assigned to the opinion, which, among other things, was ordered not to be published. However, the following language did appear:

Additionally, Sammis alleged that Brobeck urged him to settle with Lorenz to hide Brobeck's own conflict of interest, arising from its malpractice in the Saiga transaction.

*Main Events Productions, LLC v. Lacy*, 220 F. Supp. 2d 353 (D.N.J. 2002). Patrick English represented Main Events in negotiating and drafting a promotion agreement with Jeff Lacy, a boxer. This case concerns the agreement drafted by English. For that reason, Lacy has moved to disqualify English as Main Events’ lawyer. One of the bases for the motion was that English might be a witness. The court brushed that aside, noting that another lawyer would try the case. Lacy also contended that English’s role in drafting the agreement in question creates a “personal interest” and would cause him to justify his conduct in ways not necessarily in the interests of his client. The court simply disagreed saying, in effect, that the concern was speculative. The court did not say as much, but it could not have hurt that English had brought in another lawyer to try the case. Further, while the court did not discuss Lacy’s standing the make the motion, one wonders whether Lacy's not being the "victim" of the alleged conflict might have influenced the court.

*Dahlin v. Jenner & Block, L.L.C.*, 2002 U.S. Dist. LEXIS 23973 (N.D. Ill. December 12, 2002). Malpractice case against Jenner & Block. Because it is only the denial of Jenner’s motion for summary judgment, it would not be useful to present the facts in detail. Essentially, Jenner is accused of botching a commercial lease for a landlord/client. After allegedly misdrafting the lease, Jenner continued to advise the landlord. One of the allegations is that this subsequent advice was not in the landlord’s best interests because Jenner was driven by it concern over the lease allegation.

*Hetos Investments, Ltd. v. Kurtin*, 1 Cal. Rptr. 3d 472 (Cal. App. 2003). Gray Cary prepared a promissory note on behalf of the borrower. Later, the firm filed an action for the borrower against the lender, alleging, among other things, that the note was usurious. The lender moved to disqualify Gray Cary because the firm was attacking the validity of the note that it prepared. The trial court denied the motion, and the appellate court affirmed. The court considered the applicability of California Rule 3-210 (not applicable because only clients are protected by it), ABA Model Rule 1.16(a) (ABA Model Rules have no force in California), and the “appearance of impropriety” test under old ABA Canon 9 (recognized by some California courts, but not applicable here). The court noted that if anyone were to be harmed by the alleged conflict it would be Gray Carey’s client, the borrower, not the movant, the lender. At bottom,
the court felt that no harm would come to anyone by Gray Carey's remaining in the case.

Firm Avoided Problem Where "Sophisticated Client" Made the Questionable Decision in the Subsequent Litigation. Town of North Hempstead v. Winston & Strawn, LLP, 814 N.Y.S.2d 237 (N.Y. App. 2006). Winston & Strawn ("W&S") represented North Hempstead in entering into a waste disposal agreement. When the waste disposal project did not go well, one of the parties sued North Hempstead. W&S handled the defense, but the plaintiff recovered a jury verdict of some $32 million. North Hempstead then sued W&S for malpractice in its handling of the litigation. One of the grounds was that W&S did not assert an available affirmative defense. North Hempstead claimed that W&S did not assert the defense because it had a conflict arising out of the way it handled the underlying transaction. The trial court denied W&S’ motion for summary judgment. In this opinion the Appellate Division reversed. As to W&S’ failure to assert the affirmative defense, the court emphasized that it was the decision of the Town Attorney ("a sophisticated client") not to assert the affirmative defense. Moreover, the court said, the defense was not a sure thing, and W&S could not be held liable for exercising "professional judgment on a question that was not elementary or conclusively settled by authority." [Note: several of the facts recited above were not in the opinion, but surfaced in press reports regarding the unpublished trial court’s opinion.]


Hillis v. Heineman, 2009 U.S. Dist. LEXIS 29914 (D. Ariz. Mr. 25, 2009). Plaintiff sued the defendants and their lawyer ("Lawyer") for fraud and related causes of action. Lawyer appeared for all defendants, including himself. Plaintiff moved to disqualify Lawyer because he should be a witness. The court denied the motion without prejudice because it was not yet clear whether Lawyer should be a witness. What the court did not mention, and what the parties apparently did not raise, was the propriety of Lawyer defending himself as well as the other defendants, especially in light of Lawyer's having earlier represented the company involved in the case.

Finkel v. Frattarelli Bros. Inc., 2010 U.S. Dist. LEXIS 96280 (E.D.N.Y. Sept. 15, 2010). Plaintiffs are trustees of employee welfare plans. They are suing several corporations and individuals for defrauding the plans. The defendants moved to disqualify the law firm for the plaintiffs ("Law Firm") under the lawyer-as-witness
rule and because it had a conflict of interest. The court disposed of the lawyer-as-witness argument by holding that the defendants had not shown that the lawyers' testimony would be needed. The conflict of interest argument was that Law Firm would be put in the position of defending their earlier work in representing the trusts while the alleged frauds were occurring -- essentially an "underlying work" argument. The court rejected that argument holding that the focus of this case was the conduct of the defendants, not the operation of the trusts by the plaintiffs or the conduct of Law Firm in representing the plaintiffs.

*Martin v. Turner*, 2011 U.S. Dist. LEXIS 17021 (E.D. Pa. Feb. 18, 2011). Client hired Lawyer No. 1 to assist Client in collecting on a note From Company No. 1. Lawyer No. 1 negotiated a settlement between Client and Company No. 1. One term of the settlement was that Client would have a security interest in a claim by Company No. 1 against Company No. 2. Lawyer No. 1 filed a UCC-1 in connection with this security interest. Five years later, no one filed a UCC-3 continuation statement. When Client learned this could be a problem, Client fired Lawyer No. 1 and hired Lawyer No. 2. Lawyer No. 2 filed a malpractice action (this case) on behalf of Client against Lawyer No. 1, citing the failure to file the UCC-3. Lawyer No. 1 moved to disqualify Lawyer No. 2, claiming Lawyer No. 2 had a conflict of interest. The alleged conflict was that Lawyer No. 2 should have taken the position that the UCC-3 was unnecessary and should have prevented Company No. 2 from paying a creditor other than Company No. 1 or Client. By claiming in this case that Lawyer No. 1's failure to file the UCC-3 was the sole cause of Client's loss, Lawyer 2 was deflecting attention from Lawyer No. 2's failure to prevent Company No. 2 from paying the disputed funds to another creditor, a classic "underlying work" problem. In this opinion the court denied the motion to disqualify. Oddly, the court did not take a position on whether the UCC-3 was necessary to preserve Client's priority.

Basics:

Waivers

Advance Waivers

Joint Representation Waivers

Ethical Screens

Sue Friedberg, Esq.
Buchanan Ingersoll & Rooney PC
What is needed for an effective conflict of interest waiver?

• Lawyer reasonably believes he/she can provide competent and diligent representation to each affected client
• “Informed consent” from all affected clients
• In writing (best practice even where not required)
• Waiver not prohibited by Rule or decision
Informed consent

Lawyer has communicated adequate information and explanation about:

– Material risks
– Reasonably available alternatives
Waivers can be tricky

• Client seeking representation must waive first
• Client must agree to asking adverse party to grant the waiver
• Client must be willing to disclose sufficient information to be confident of “informed consent”
Effective Advance Waivers

• Demonstrate that client understands material risks (foreseeable adverse consequences) and reasonably available alternatives

• Granted by experienced user of legal services who is reasonably informed about the risks

• Client is independently represented by other counsel

• Scope of waiver limited to future conflicts unrelated to the subject of the representation
Common Legal Interest and Joint Representation

- Inherent conflicts—always need waiver of conflicts

- Evaluate facts and circumstances that could present conflicts to decide if consentable

- Also need consent to disclose confidential information
Requirements for effective waiver for joint representation:

– Identify sources of possible conflict
– Obtain consent to share confidential information
– Describe risks:
  • Divided loyalty
  • Attorney-client privilege
  • May need to withdraw
  • May need engage separate counsel
– Explain reasonably available alternatives:
  • Separate counsel
Creeping Conflicts

- The initial identification of a conflict (current client or former client) is a “snapshot.”
- Conflicts may develop subsequently and must be dealt with as they arise.
- An “after-developing” conflict is no different than a conflict at the outset of a representation.
Rule 1.10

Ethical Screens
Ethical Screens Only Effective for:

• Screening an incoming lawyer. Rule 1.10(b)

• Screening a lawyer who dealt with a prospective client. Rule 1.18

• Screening a lawyer who served as judge, arbitrator or mediator. Rule 1.12

• By agreement of clients as a condition to a waiver.
Requirements for Ethical Screen

• Implemented timely--as soon as need for screen becomes apparent
• Adequate internal procedures in place (notice, prohibition on communication, segregation of electronic and hard copy files)
• Timely notice given to affected client or former client
Rule 1.10

Prospective Client Conflicts
Prospective Client Conflict Imputed Unless:

(i) lawyer took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to accept representation;

(ii) the disqualified lawyer is screened and not apportioned any part of the fee; and

(iii) written notice given promptly to prospective client.
“Do’s” for Initial Interview

• Limit preliminary contact to obtaining information for conflict search (Who is/are clients, client affiliates, adverse, adverse affiliates?)
• Clear conflicts before any substantive discussion
• Limit initial interview to information “reasonably necessary” to determine whether to accept representation
“Don’ts” for Initial Interview

• Don’t have even preliminary substantive discussion until conflict search is complete and clear
• Avoid obtaining “significantly harmful” information
• Don’t accept possession of documents
• Don’t accept or begin the engagement until the Firm approval process is complete
VT Bar Association Continuing Legal Education Registration Form

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Conflicts of Interest in Law Practice: A Practical Guide
TELESEMINAR
November 21, 2011

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<th>Early Registration Discount By 11/14/11</th>
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